IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-514

THOMAS D. McDONALD,
Petitioner,

V.

HON. DAVID HEADRICK, as Sheriff of Madison County, Alabama;
CHARLES F. EDGAR, JR., Surety,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GLENN F. MANNING
of
Watts, Salmon, Roberts,
Manning & Noojin
Suite 200
Terry-Hutchens Building
Huntsville, Alabama

Attorneys for Petitioner

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

THOMAS D. McDONALD,
Petitioner,

V.

HON. DAVID HEADRICK, as Sheriff of Madison County, Alabama;
CHARLES F. EDGAR, JR., Surety,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered June 20, 1977, on that certain appeal in said Court styled Thomas D. McDonald, Petitioner-Appellant, versus Hon. David Headrick, as Sheriff of Madison County, Alabama; Charles F. Edgar, Jr., Surety, Respondents, bearing Docket Number 77-1238, which said judgment affirmed the judgment of the United States District Court for the Northern District of Alabama, Northeastern Division, entered December 29, 1976, denying Petitioner's Petition for Writ of Habeas Corpus.

OPINIONS BELOW

Petitioner McDonald was convicted in the Circuit Court of Madison County, Alabama, on March 7, 1974, after trial by jury, of the offense of "accepting a bribe." He appealed the conviction to the Court of Criminal Appeals of Alabama, which affirmed the judgment of the trial court in *McDonald v. State*, 57 Ala. App. 529, 329 So. 2d 583 (Ala. Cr. App. 1975). McDonald petitioned for rehearing, but the petition was denied, one justice dissenting.[1] McDonald petitioned the Supreme Court of Alabama for writ of certiorari to review the judgment of the Court of Criminal Appeals. On September 30, 1975, the Supreme Court of Alabama granted the petition and issued the writ of certiorari, but on April 9, 1976, the Supreme Court quashed the writ and denied the petition without opinion.[2] A petition to the United States Supreme Court for writ of certiorari to the Court of Criminal Appeals of Alabama was also denied.[3]

Having exhausted his State remedies, McDonald filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Alabama. The District Court referred the Petition to a Magistrate for findings and recommendations. The Magistrate's report is included in the Appendix at page 7a. On December 29, 1976, the District Court rendered judgment "reluctantly" accepting the Magistrate's recommendation that the Petition for Habeas Corpus be denied.[4]

Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Fifth Circuit

[1]Opinion of Court of Criminal Appeals of Alabama, *McDonald vs. State*, 57 Ala. App. 529, 329 So. 2d 583, Appendix pg. 15a.

[2]*McDonald vs. State* (1975) 295 Ala. 410, 329 So. 2d 596.

[3]*McDonald vs. Alabama*, (1976), 429 U.S. 834, 50 L. Ed. 2d 99, 97 S. Ct. 99.

[4]See Appendix, pg. 5a.

upon a certificate of probable cause granted by the District Court. The Fifth Circuit affirmed the District Court on June 20, 1977.[5] Petitioner's application to the Fifth Circuit for rehearing was denied July 20, 1977.[6]

JURISDICTION

Petitioner seeks review by this Court of the judgment of the United States Court of Appeals for the Fifth Circuit, made and entered on June 20, 1977, which affirmed the judgment of the District Court denying McDonald's Petition for Writ of Habeas Corpus.[5] McDonald's petition for rehearing was denied by the Fifth Circuit on July 20, 1977.[6]

Jurisdiction of this Petition for Writ of Certiorari is conferred upon the Supreme Court of the United States by 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

A.

Explanatory Statement

Petitioner was charged by indictment in the Circuit Court of Madision County, Alabama, with violation of a state bribery statute. The case was submitted to a jury by the State trial court under instructions requiring a *bilateral* bribery agreement between Petitioner, as the bribe-taker, and another person, as the bribe-giver, for conviction. He was found guilty and the trial judge entered judgment of conviction and sentence for *"accepting a bribe."* Petitioner appealed the conviction to the Court of Criminal Appeals of Alabama, contending that the evidence was insufficient to support the conviction. The

[5]See memorandum opinion of the United States Court of Appeals for the Fifth Circuit, 551 F. 2d 253, Appendix, pg. 2a.

[6]See Appendix, pg. 4a.

Court of Criminal Appeals affirmed, holding that the bribery statute under which the indictment was drawn embraced not only a bilateral bribery agreement, but also a mere *unilateral* offer to accept a bribe (a solicitation), and that the evidence was sufficient to support a jury verdict that Petitioner was guilty of offering to accept sexual intercourse from the other person, a woman, in exchange for the judicial favors the indictment alleged he agreed to give her. Petitioner, on motion for rehearing in the Court of Criminal Appeals, petition for certiorari filed in the Alabama Supreme Court, and petition for certiorari in the United States Supreme Court, unsuccessfully contended that there was no relevant evidence to support the constituent elements of the crime of which he was actually convicted, and that due process required that the question of the sufficiency of the evidence to support the judgment of conviction be appraised by the reviewing courts upon the basis of the offense for which he was tried and convicted, i.e., of being a party to a *bilateral* bribery agreement, and not upon the basis of a charge (solicitation of a bribe) upon which he was neither tried nor convicted, and, in fact, upon which he was acquitted if such a charge was included in the indictment.

After exhausting his state remedies, Petitioner filed a petition in the United States District Court for the Northern District of Alabama for Writ of Habeas Corpus, claiming that his conviction in the State Court was void because constituent elements of the crime of which he was convicted were not supported by any relevant evidence of probative value. The District Court appraised the "evidence" accepted at Petitioner's trial as if Petitioner had been tried and convicted of *soliciting* a bribe, and denied the Writ of Habeas Corpus, holding that there was not a "total absence of evidence upon which the conviction was based." On appeal of the District Court's judgment to the Circuit Court of Appeals, the Court of Appeals affirmed the District Court, holding that the District Court did not err in finding "that there was not a total lack of relevant evidence to support the conviction," and pointed to the ex post facto interpretation of the bribery statute by the Court of Criminal Appeals of Alabama on McDonald's appeal to that court which the District Court said held that the bribery statute under which the indictment was drawn included a mere unilateral offer to accept a bribe, and did not necessarily require a bribery agreement.

B.

Questions Presented

The questions presented to the court for review are:

Ultimate Questions

1. Was Petitioner deprived of his right to "Due Process of Law" guaranteed him by the Fourteenth Amendment to the Constitution of the United States by the action of the Court of Criminal Appeals of Alabama in appraising the question of the sufficiency of the evidence against Petitioner to support the conviction as if Petitioner had been tried and convicted in the State trial court of the offense of making a mere *unilateral offer* to accept a bribe (a solicitation), *when in fact Petitioner was convicted of a separate and distinct offense therefrom, having different constituent elements,* viz., the offense of being a party to a *bilateral bribery agreement* with another person, and did, therefore, the Court of Appeals err in affirming the judgment of the United States District Court denying Petitioner's application for Writ of Habeas Corpus?

2. Did the United States Court of Appeals for the Fifth Circuit err in holding that the District Court properly

found that there was "not a total lack of relevant evidence to support" Petitioner's conviction in the State Court?

Subsidiary Questions

1. Did the United States Court of Appeals for the Fifth Circuit, and the United States District Court for the Northern District of Alabama, err in appraising the alleged "evidence" against Petitioner as if he had been convicted in the State trial court of making a mere *unilateral offer* to accept a bribe, when in fact he was convicted of a separate and distinct offense therefrom, having different elements, viz., the offense of being a party to a *bilateral* bribery agreement with another person?

2. Was there "a total lack of relevant evidence" to support Petitioner's conviction of "*accepting* a bribe," i.e., of being a party to the *bilateral* bribery agreement charged in the indictment, and for which Petitioner was tried and adjudged guilty in the State trial court?

3. Was there "a total lack of relevant evidence" even to support a conviction under the indictment against Petitioner for soliciting a bribe—an offense for which Petitioner was not tried, convicted, or sentenced?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of

war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

Amendment XIV

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws."

Statute

Code of Alabama 1940 (Recompiled 1958), Title 14, Sec. 64. *Accepting bribe by . . . officer*

"Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or the clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years."

STATEMENT OF THE CASE

A.

NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION

Petitioner McDonald was tried by a jury in the Circuit Court of Madison County, Alabama, under an indictment reading as follows:

> "Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity, or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the State of Alabama vs. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama." (R-18)[7]

The indictment charged a violation of Section 64 of Title 14 of the Code of Alabama 1940 (Recompiled 1958), which is quoted, *infra*, in full.

The State trial court, in its oral charge to the jury before the jury retired to consider its verdict, instructed the jury that the jury could not find the Defendant (Petitioner) guilty under the indictment unless the jury found that a *bilateral* bribery agreement existed between Petitioner and the prosecuting witness, Myra Braidfoot, whereby Petitioner accepted or agreed to accept sexual favors from Myra Braidfoot under an understanding with her that, in consideration of sexual favors she would give Petitioner, he would give her one or more of the official favors specified in the indictment. Among such instructions were the following:

> "DEFENDANTS REQUESTED CHARGE NO. 39
>
> The Court charges the Jury that you cannot find the Defendant guilty of accepting a bribe unless you believe from the evidence beyond a reasonable doubt that a corrupt agreement or understanding existed between the Defendant and Myra Layton Braidfoot that the Defendant, as Judge of the Madison County Court, would give his act, opinion, decision, or judgment in a particular manner, or upon a particular side, of the criminal prosecution against Myra Layton Braidfoot which is named in Count One of the indictment."

---

[7]Reference is to the page number of the Record on Appeal to the United States Court of Appeals for the Fifth Circuit.

"DEFENDANT'S REQUESTED CHARGE NO. 40

The Court charges the Jury that the gravamen of the charge against the Defendant under Count One of the indictment is *not* that the Defendant accepted sexual favors or a promise of sexual favors from Myra Layton Braidfoot, or that his actions as Judge of the Madison County Court with respect to the criminal prosecution against Myra Layton Braidfoot which was then pending in said Court were influenced by such acceptance, but that the alleged acceptance of such sexual favors or promise of such sexual favors was under an agreement or understanding between the Defendant and Myra Layton Braidfoot that the Defendant's actions with respect to such criminal prosecution would be influenced by such acceptance, and unless you believe from the evidence beyond a reasonable doubt that such agreement or understanding existed, you cannot find the Defendant guilty of accepting a bribe under Count One of the indictment."

"DEFENDANT'S REQUESTED CHARGE NO. 41

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment unless you believe from the evidence beyond a reasonable doubt that the Defendant not only accepted sexual favors, or a sexual relationship, or a promise of sexual favors or sexual relationship, from Myra Braidfoot, and that the Defendant, because of such sexual favors or sexual relationship, or because of such promise of sexual favors or sexual relationship, dismissed or caused to be dismissed, nol-prossed, or caused to be nol-prossed, reduced or caused to be reduced, continued or caused to be continued, or otherwise disposed of or had disposed of, the criminal prosecution against Myra Layton Braidfoot which is named in Count One of the indictment, but that the Defendant also took such actions under an agreement or with an understanding with Myra Layton Braidfoot that he would take such action with respect to such prosecution."

"DEFENDANT'S REQUESTED CHARGE NO. 72

The Court charges the Jury that you cannot find the Defendant guilty under Count One of the indictment unless you believe from the evidence beyond a reasonable doubt that a corrupt agreement or understanding existed between the Defendant and Myra Layton Braidfoot."

"DEFENDANT'S REQUESTED CHARGE NO. 73

The Court instructs the Jury that if the Jury does not believe from the evidence beyond a reasonable doubt, after a consideration of all of the evidence, that the Defendant, in or near his office in the Madison County Courthouse, corruptly accepted from Myra Layton Braidfoot, or agreed with her to accept, one or more sexual favors, or a sexual relationship, from her, and that such sexual favors or relationship were of value to the Defendant, or that the Defendant corruptly accepted or agreed with Myra Layton Braidfoot to accept a promise from her of one or more sexual favors, or a sexual relationship from her, and that such promise by Myra Layton Braidfoot was of value to the Defendant, and that such acceptance or agreement to accept such sexual favors or relationship, or such promise of sexual favors or relationship, was under an agreement or with an understanding with Myra Layton Braidfoot that the Defendant, as Judge of the Madison County Court, would nol-pros or cause to be nol-prossed, or dismiss or cause to be dismissed, or reduce or cause to be reduced, or continue or cause to be continued, or to otherwise dispose of, the criminal prosecution of Myra Layton Braidfoot which is named in Count One of the indictment, you cannot find the Defendant guilty of accepting or agreeing to accept a bribe under Count One of the indictment."

There was a Jury verdict finding Petitioner "guilty" as charged in Count One of the indictment." (R-42, 97) [7] The State trial court entered judgment upon the verdict as follows:

"THEREUPON the Defendant being present in Open Court and attended by his counsel and the Court having considered the same, it is ORDERED AND ADJUDGED by the Court that the Defendant is guilty, in accordance with the verdict of the jury, of accepting a bribe as charged in Count One of the indictment, and that as punishment for the said offense the Defendant be and is sentenced to imprisonment in the penitentiary of Alabama for three (3) years."[8]

Petitioner appealed the judgment of conviction to the Court of Criminal Appeals of Alabama, which affirmed the conviction[1] in *McDonald vs. State*, 57 Ala. App. 529, 329 So. 2d 583, one Justice dissenting on Petitioner's motion for rehearing.[1]

The Alabama Supreme Court and the United States Supreme Court denied certiorari to the Court of Criminal Appeals of Alabama. *McDonald vs. State*, 329 So. 2d 596 (Ala. 1975); cert. den. 429 U.S. 834, 50 L. Ed. 2d 99, 97 S. Ct. 99 (1976).

After exhausting his state remedies, Petitioner filed his petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Alabama, contending, as he had in the trial court, and in all appellate courts, that the conviction was not supported by relevant evidence, and that his conviction and sentence were unconstitutional and void because obtained in violation of the due process clause of the Fourteenth Amendment. Jurisdiction of the Habeas Corpus petition in the District Court was based on 28 U.S.C. Sec. 2254.

The District Court, pursuant to local practice, referred McDonald's habeas corpus petition to a United States Magistrate for report and recommendation. The Magistrate issued an order to the Respondents to the habeas corpus

[8]See Appendix, pg. 39a.

petition to show cause why the Writ of Habeas Corpus should not issue, and Respondents, represented by the Attorney General of Alabama, filed a return denying Petitioner's right to relief, but admitting that Petitioner had exhausted his state remedies. The transcript of the testimony at Petitioner's trial in the State Court was filed with the return. McDonald filed a written Answer to the Respondents' return to the show cause order, and filed certified copies of various documents to support the allegations of the Answer. Both McDonald and Respondents filed motions for summary judgment. (R-102, R-69)[7]

The Magistrate filed his report to the Hon. Clarence W. Allgood, District Judge, on December 3, 1976.[9] The Magistrate found that the District Court was vested with jurisdiction of the Habeas Corpus petition, that McDonald had exhausted his state remedies, and that McDonald was entitled to consideration of his petition on the merits. The Magistrate recommended that the Writ of Habeas Corpus be denied.[9] McDonald filed written exceptions and objections to the Magistrate's report. (R-55)[7] Respondents filed none. The District Court "reluctantly" entered judgment on December 29, 1976, denying the Writ of Habeas Corpus,[4] saying that "in spite of a great feeling of compassion for the Petitioner, this Court cannot say that there was a total absence of evidence upon which the conviction was based."[4] The District Court granted a certificate of probable cause for Petitioner's appeal to the Court of Appeals for the Fifth Circuit (R-181),[7] and McDonald appealed to the Circuit Court of Appeals.

[9]See Appendix, pg. 7a.

B.

RELEVANT FACTS CONCERNING THE CONVICTION

Most of the "evidence" on which the Respondents rely to support the conviction, and on which the District Court and the Court of Appeals rest their judgments, is summarized in the Magistrate's report to the District Court, which is appended hereto (Appendix, pg. 7a). The alleged criminal act of which Petitioner was tried and convicted consisted solely of the following remark allegedly made by Petitioner to the alleged bribe-giver, Myra Braidfoot:

> "He (Petitioner) said if I (Braidfoot) met him at Kings Inn we could talk about the situation and maybe take care of it." (Appendix, pg. 10a.)

At the trial in the State Court, Mrs. Braidfoot said that she did not have sexual intercourse with Petitioner; that Petitioner did not ask her to have sexual intercourse with him; that she did not promise him sexual intercourse; that she did not propose to Petitioner that if he would give her judicial favors she would have sexual intercourse with him; and that she did not meet Petitioner at the Kings Inn. She further testified that "10:00" referred to 10:00 o'clock A.M. The Kings Inn is a motel in Huntsville, Alabama, which has a restaurant, and a club.

The Court of Criminal appeals of Alabama, in passing upon the sufficiency of the evidence to support the jury verdict, and in response to Petitioner's argument that there was no relevant "evidence," as the word is used in a legal sense, to support the existence of the constituent elements of the crime, said:

> "Although the evidence before the jury was in dispute, it could be inferred from this statement in Braidfoot's testimony, 'If I met him at the Kings Inn we could talk about the situation and maybe take care of it,' appellant was asking for a 'thing of value' or an 'act beneficial to' himself."

The Court of Criminal Appeals further said:

> "The Alabama statute condemns an offer to accept a bribe by promise of a 'thing of value' and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him." (Appendix, pg. 34a.)

The Court of Criminal Appeals then proceeded to affirm McDonald's conviction on the theory that the jury could have reasonably inferred from the quoted remark that McDonald made a unilateral offer to Mrs. Braidfoot to give her judicial favors in return for sexual favors from her. The fact that a conviction for such alleged offense was expressly excluded by the State trial court in its instructions to the jury, and that the judgment of conviction itself declared the conviction was for "*accepting*" a bribe, was ignored by the Court of Criminal Appeals, and rehearing was denied, although the issue was raised by Petitioner and vehemently argued.

Petitioner strongly pressed upon both the District Court and the United States Court of Appeals his contentions that the Court of Criminal Appeals of Alabama had violated his Fourteenth Amendment right to due process of law by appraising the sufficiency of the evidence against him as if he had been convicted of soliciting a bribe, and not appraising it on the basis of the actual conviction of being a party to a bilateral bribery agreement—an entirely separate and distinct crime, composed of different constituent elements. Both courts completely ignored the contention, although it was pressed more forcefully than any other, and was the foundation of Petitioner's case on Habeas Corpus. Both Federal Courts appraised the evi-

dence against Petitioner as if he had been convicted of a mere solicitation, and found that there was "not a total lack of relevant evidence to support the conviction." No court, State or Federal, has appraised the evidence against the constituent elements of the crime for commission of which Petitioner was actually tried and convicted, irrespective of whether or not the statute and indictment included a mere solicitation within their scope.

The lower courts have either avoided their responsibility to appraise the evidence upon the basis of the crime of which Petitioner was actually convicted, or subscribe to the opinion that a conviction may stand which is supported by evidence of commission of a separate and distinct crime from that of which an accused has been tried and convicted, and believe that a conviction may stand which is based upon ex post facto interpretation of a criminal statute by an appellate court which expands the scope of the statute to include acts which the trial judge instructed the jury were not included within the scope of the statute, and, indeed, of which the accused in this case was acquitted at his trial, if in fact he was charged with that offense.

REASONS FOR GRANTING THE WRIT

I

In affirming the judgment of the District Court, the Court of Appeals decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States holding that, to conform to due process of law, a person convicted of crime in a State court is entitled on review of the conviction by a State appellate court to have the question of the sufficiency of the evidence to support the conviction appraised in consideration of the case as it was tried, and on the issues as determined in the trial

court, and not on the basis of issues of fact on which the convicted person might have been tried, but on which he was neither tried nor convicted. Cole v. Arkansas (1948), 333 U.S. 196, 92 L. Ed. 644, 68 S. Ct. 514, and cases cited therein; Eaton v. City of Tulsa (1974), 415 U.S. 697, 39 L. Ed. 2d 693, 94 S. Ct. 1228; Rabe v. Washington (1972), 405 U.S. 313, 31 L. Ed. 2d 258, 92 S. Ct. 993; Garner v. Louisiana (1961), 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248; Gregory v. Chicago (1969), 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946.

Throughout the proceedings in the courts below, the main thrust and essential contentions of Petitioner have been that the validity of his conviction of *accepting* a bribe under a bilateral bribery agreement cannot constitutionally be determined by reviewing courts as though he had been convicted of unilaterally *soliciting* a bribe, which is a separate and distinct offense from *accepting* a bribe under a bilateral agreement, and is composed of different elements. Not a single one of the reviewing courts have rejected such contentions. The contentions have simply been ignored. The courts reviewing the conviction, including the lower federal courts, have all denied relief upon the theory that there was evidence against Petitioner to support a conviction for soliciting a bribe, i.e., for making a unilateral offer to accept a bribe. The conclusion is erroneous and the theory itself is constitutionally untenable.

The State trial judge, following the plain words of the statute under which Petitioner was indicted, instructed the jury that it could not find Petitioner guilty under the indictment unless the prosecution had proved a bilateral bribery agreement.[10] The jury convicted and the trial judge entered judgment that the Petitioner was guilty of

[10]See quoted instructions of the State trial judge to the Jury under the "Statement of the Case" portion of this Petition.

"accepting" a bribe[11]—an entirely distinct offense from *offering* to *accept*. The Court of Criminal Appeals of Alabama, replying to Petitioner's contention on appeal to that court that the conviction of *"accepting* a bribe" was not supported by *substantial evidence of all* elements of such offense, avoided consideration of the appeal on the basis of the crime of which Petitioner was convicted and sentenced, which would have necessitated a reversal of the conviction, and affirmed the conviction on the theory that the *statute* as drawn was sufficiently broad to include a *mere bribery solicitation* within its scope, and held that there was sufficient evidence of a solicitation from which the jury could have reasonably inferred guilt of that crime. The Court of Criminal Appeals apparently deemed it unimportant that the trial judge had excluded a conviction for unilateral solicitation of a bribe in his instructions to the jury, and that the judgment of conviction itself specified the crime as *"accepting"* a bribe. Because Petitioner had not been convicted by the jury of soliciting a bribe, and the Court of Criminal Appeals affirmed Petitioner's conviction as if he had been tried and convicted of that crime, the practical effect of the Court of Criminal Appeals' decision was not only to deny review of the actual conviction of "accepting a bribe," but also to itself try, convict, and sentence Petitioner to three (3) years imprisonment for solicitation of a bribe. Indeed, if the indictment did include the offense of a mere solicitation of a bribe, as the Court of Criminal Appeals said it did, the Petitioner was *acquitted* of that charge when the court adjudged Petitioner guilty only of "accepting" a bribe, and Petitioner now faces three (3) years imprisonment for a crime of which he has been acquitted!

[11]See quoted portion of judgment of conviction in the "Statement of the Case" portion of this Petition, *infra*.

This Court confronted the identical issue presented here in *Cole vs. Arkansas* (1948), 333 U.S. 196, 92 L. Ed. 644, 68 S. Ct. 514. The facts in McDonald's case are closely analogous to those in *Cole*, and this court held that Cole, who had been convicted in an Arkansas court, had been deprived of due process of law by the action of the Supreme Court of Arkansas in affirming his conviction because, in the opinion of that court, the evidence was sufficient to support a conviction of a crime charged by the indictment, but which had been excluded from the jury's consideration by the trial judge. In the opinion written for a unanimous court by Mr. Justice Black, this court said that the Arkansas Supreme Court had reviewed and affirmed the conviction as though Cole had been tried for violating a section of the criminal statute for which he was in fact "neither tried nor convicted;" and that Defendant was "not tried for or found guilty" of the offense which the Arkansas court had found was supported by evidence. Speaking of the Arkansas Supreme Court, this court said:

> "It affirmed their convictions as though they had been tried and convicted of a violation of Section 1 when in truth they had been tried and convicted only of a violation of a single offense charged in Section 2, an offense which is distinctly and substantially different from the offense charged in Section 1. *To conform to due process of law, Petitioners were entitled to have the validity of their convictions appraised in consideration of the case as it was tried and as the issues were determined in the trial court."*

It was the duty of the United States District Court to grant Petitioner's application for Writ of Habeas Corpus because of the deprivation by the Court of Criminal Appeals of Alabama of Petitioner's right to due process of law, which included Petitioner's right to have that court appraise his conviction "in consideration of the case as it was

tried and as the issues were determined in the trial court." The District Court, however, refused relief upon the theory that the Court of Criminal Appeals of Alabama had interpreted the bribery statute on McDonald's appeal to include a unilateral solicitation of a bribe, and the District Court found that there was not "a total absence of evidence" of that offense. The Court of Appeals affirmed the District Court on the same theory. The judgments of the courts below are therefore repugnant to *Cole, supra,* and its progeny. *Eaton vs. City of Tulsa, supra; Rabe vs. Washington, supra; Garner vs. Louisiana, supra; Gregory vs. Chicago, supra.*

II

In affirming the judgment of the District Court denying Petitioner's application for Writ of Habeas Corpus, the Court of Appeals decided a Federal question in a way in conflict with applicable decisions of the United States Supreme Court holding that it is a violation of the due process clause of the Fourteenth Amendment to the United States Constitution for a State to send an accused person to prison following conviction of a charge on which he was never tried. Cole vs. Arkansas, supra; Rabe vs. Washington, supra; Gregory vs. Chicago, supra.

In the preceding section of this Petition, McDonald has pointed to the fact that the effect of the State appellate court's actions in appraising the evidence against him as if he had been convicted of a separate and distinct offense from that which was submitted to the jury is to imprison him for an offense with respect to which he has neither been tried nor convicted. The Court of Criminal Appeals of Alabama also adopted, retroactively, an interpretation of the Alabama bribery statute which had not theretofore been made.

In *Cole vs. Arkansas,* cited *supra,* this court said:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of very accused in a criminal proceeding in all courts, State or Federal. *Re Oliver,* 333 U.S. 257, 273, Post, 682, 694, 68 S. Ct. 499, decided today, and cases there cited. If, as the State Supreme Court held, Petitioners were charged with a violation of Section 1, it is doubtful both that the information fairly informed them of their charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. *It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."*

Otherwise expressed, this court said in *Re Oliver* (1948) 333 U.S. 257, 92 I. Ed. 682, 333 U.S. 257:

> "It is the law of the land that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made *and fairly tried* in a public tribunal."

The Court of Criminal Appeals of Alabama sends Petitioner to prison on a charge on which he has never been tried, and on which he has not been convicted. *Cole vs. Arkansas, supra; Rabe vs. Washington, supra; Gregory vs. Chicago, supra.* The United States District Court and the Court of Appeals have erroneously refused Petitioner relief, contrary to, and in conflict with, the decisions of this court in the cases cited.

III

In affirming the judgment of the District Court, which denied Petitioner's application for Writ of Habeas Corpus,

the United States Court of Appeals decided a Federal question in a way in conflict with applicable decisions of the United States Supreme Court holding that it is a violation of the due process clause of the Fourteenth Amendment for a State to send an accused person to prison as a result of an unforeseeable interpretation of a state criminal statute by a State judiciary after commission of the alleged offense. Bouie vs. City of Columbia (1963) 378 U.S. 347, 12 L. Ed. 894, 84 S. Ct. 1697; Rabe vs. Washington, supra; Garner vs. Louisiana, supra; Gregory vs. Chicago, supra.

In expanding the Alabama bribery statute on McDonald's appeal to include a mere unilateral solicitation of a bribe, which retroactively adopted an interpretation of the statute which had not theretofore been made, the state appellate court adopted an interpretation which expanded the statute far beyond the ordinary meaning of the words employed therein; it adopted an interpretation inconsistent with judicial interpretations of similar statutes; (*Barefield vs. State*, 14 Ala. 603; Staggs vs. State [1974], 53 Ala. App. 314, 320, 299 So. 2d 756; *People vs. Weitzel* [Cal.], 255 Pac. 792, 52 A.L.R. 811; *People vs. Coffey*, 161 Cal. 433, 119 Pac. 901, 39 L.R.A. [N.S.] 70', *U.S. vs. Dietrich*, 126 F. 664; *State vs. Bowles*, 70 Kan. 824; 79 Pac. 726; 69 L.R.A. 176; *Hutchinson vs. State*, 36 Tex. 293), and it adopted an interpretation contrary to that of the trial court. In reality, the Court of Criminal Appeals amended the statute by judicial interpretation to say a thing which is not fairly included within the ordinary connotation of the words of the statute, but which is contrary to those words. In doing so, the court made it possible for it to avoid review of the conviction which was in fact obtained, and was before it for review, and to review a conviction which was not obtained, and on a charge of its own making. In practical effect, the court then sentenced Petitioner on the charge the court had made. The United States District Court and the United States Court of Appeals have approved such actions of the Court of Criminal Appeals of Alabama by testing the "evidence" against elements of a crime of which Petitioner was not convicted, and in denying Petitioner's application for Writ of Habeas Corpus based on such assessment.

In *Bouie vs. City of Columbia*, cited *supra*, this Court held that the Due Process Clause of the Fourteenth Amendment was violated by state convictions of Negroes on charges of having refused to leave the restaurant department of a drugstore in violation of a statute which by its terms made it a criminal offense to enter lands of another after notice from the owner prohibiting such entry, but which, *after* commission of the alleged offense, was construed by the highest court of the state to cover the act of remaining on the premises after receiving notice to leave. This Court said that judicial enlargement of a criminal statute by interpretation is at war with the fundamental concept of the common law that crimes must be defined with appropriate definiteness, and, therefore, a violation of the Due Process Clause may be accomplished by a state judiciary in the course of construing an otherwise valid state statute. This Court said that an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law.

The decisions of the United States Court of Appeals and of the United States District Court in this case are repugnant to the decisions of this court in *Bouie vs. City of Columbia, supra; Rabe vs. Washington, supra; Garner vs. Louisiana, supra;* and *Gregory vs. Chicago, supra.*

IV

In affirming the judgment of the United States District Court, which denied Petitioner's application for Writ of Habeas Corpus, the United States Court of Appeals decided a Federal question in a way to conflict with numerous applicable decisions of the United States Supreme Court holding that it is a violation of the Due Process Clause of the Fourteenth Amendment for a state to convict a person of crime and send him to prison unless all constituent elements of the offense on which he was tried are supported by evidence. Thompson vs. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624; Vachon vs. New Hampshire (1974), 414 U.S. 478, 38 L. Ed. 2d 666, 94 S. Ct. 664.

A.

PETITIONER'S CONVICTION OF *"ACCEPTING* A BRIBE" WAS TOTALLY DEVOID OF EVIDENTIARY SUPPORT AND IS VOID.

It is axiomatic that every crime consists of its constituent elements, and, if only one of its elements is absent, there is no crime; therefore, if there is no relevant evidence to support one or more constituent elements of the crime, there is a "total lack of relevant evidence to support the conviction." This Court has held in numerous decisions that a conviction of crime in a state court which is "totally devoid of evidentiary support" is unconstitutional and void under the Due Process Clause of the Fourteenth Amendment, and the conviction is "totally devoid of evidentiary support" if there is a total lack of relevant evidence to support one or more of the elements of the crime. *Thompson vs. Louisville, supra; Vachon vs. New Hampshire, supra; Shuttlesworth vs. Birmingham* (1965), 382 U.S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211; *Taylor vs. Louisiana* (1962),

370 U.S. 154, 8 L. Ed. 2d 395, 82 S. Ct. 1188, reh. den. 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1578; *Brown vs. Louisiana* (1966), 383 U.S. 131, 15 L. Ed. 2d 637, 86 S. Ct. 719; *Johnson vs. Florida* (1968), 391 U.S. 596, 20 L. Ed. 2d 838, 88 S. Ct. 1713; *Harris vs. U.S.*, 404 U.S. 1232, 1233, 30 L. Ed. 2d 25, 92 S. Ct. 10.

But what is "relevant evidence?" In *Thompson vs. Louisville, supra,* this Court said that "there is no semblance of evidence from which any person could *reasonably infer* that Petitioner . . . . . was loitering or loafing . . . . . ." "Evidence" has been defined as "the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain." *31 C.J.S., Evidence,* Sec. 1, page 815. "Evidence must amount to something of relevant consequence and of a substantial nature from which the fact in issue can be reasonably inferred. It does not consist of vague, uncertain, irrelevant matter, not carrying the quality of proof to induce conviction." *McDonald vs. Robertson,* C.C.A. Mich., 104 F. 2d 945, 948.

An "inference" is a logical and reasonable deduction from proven fact; it is more than a mere surmise, a possibility, a supposition or a conjecture. *Woodward Iron Company vs. Goolsby,* 242 Ala. 329, 6 So. 2d 11. To authorize an inference, there must be proof of *facts* from which the inference (deduction) naturally flows. *Brickley v. State* (1970), 286 Ala. 546, 243 So. 2d 502. Speculation cannot supply the place of proof. *Moore vs. Chesapeake and O. Ry. Co.,* 340 U.S. 573, 95 L. Ed. 547, 71 S. Ct. 428; *Galloway vs. U.S.,* 319 U.S. 372, 395, 87 L. Ed. 1458, 63 S. Ct. 1077.

"Evidence," then, is simply proof of facts from which a fact in issue can be reasonably inferred.

The issue before the Court of Criminal Appeals of Alabama on Petitioner's appeal to that court was whether Peti-

tioner's conviction of being a party to a bilateral bribery agreement was supported by substantial evidence; the issue before the United States District Court and the Court of Appeals was whether each element of such agreement was supported by some relevant evidence, as above defined. All three courts ignored the issue and tested the validity of the conviction on the basis of another distinct crime, i.e., solicitation of a bribe, of which Petitioner was neither tried nor convicted.

The elements of the alleged crime for commission of which Petitioner was tried and convicted, under the indictment, and the court's instruction to the jury, are:

1. McDonald *corruptly*
2. *Agreed* with Myra Braidfoot to accept sexual favors from her, or he accepted a *promise* from her of sexual favors

which was

3. *"Under an agreement or understanding"* with Myra Braidfoot that McDonald would "reduce", "continue," or dispose of, "in a manner beneficial" to Myra Braidfoot, the larceny case then pending against Myra Braidfoot in the Madison County Court.

In other words, for the crime charged, and for which McDonald was tried, to have been committed, there must have been (1) an *agreement between* McDonald and Myra Braidfoot that she would give, and McDonald would receive, sexual favors; (2) an "agreement or understanding" between McDonald and Braidfoot that McDonald would continue or reduce Braidfoot's larceny case, or dispose of it "in a manner beneficial" to her; (3) the promise made by Braidfoot to McDonald must have been "under" the "agreement or understanding" with McDonald that McDonald would give Braidfoot the official favors alleged in the indictment; and (4) McDonald must have *corruptly* accepted

Braidfoot's promise of sexual favors. Thus, under the indictment, and under the instructions of the trial court to the jury, the official favors that Braidfoot was to receive from McDonald were the *quid pro quo* for the sexual favors McDonald was to receive from Myra Braidfoot.

The "evidence" against Petitioner is detailed in the opinion of the Court of Criminal Appeals of Alabama[1] and in the Magistrate's report to the District Court.[9] Essentially, the so-called "evidence" that the alleged crime for which Petitioner was tried even occurred (corpus delicti) was contained in the single sentence from Myra Braidfoot's testimony that Petitioner said "if I met him at the Kings Inn we could talk about the *situation* and *maybe* take care of it." (R-150-151)[7] Such was recognized by the Court of Criminal Appeals of Alabama in its opinion.[1] Accordingly, the judgment of conviction is void unless:

1. McDonald's remark to Braidfoot that *"if* I met him at the Kings Inn" at (10:00 A.M.) authorized a *reasonable* deduction that McDonald was proposing sexual intercourse.
2. McDonald's remark to Braidfoot that "we could talk about the *situation* and *maybe* take care of it" authorized a *reasonable* deduction that it was a promise on McDonald's part that if Braidfoot met him at Kings Inn and had sexual intercourse with him, McDonald would "reduce," "continue," or "dispose of" Braidfoot's larceny case "in a manner beneficial" to her.
3. McDonald's alleged remark authorized a *reasonable* deduction that *Braidfoot* agreed to give McDonald sexual intercourse in exchange for the judicial favors alleged in the indictment, i.e., there was a meeting of the minds.

Obviously, the above listed *deductions* would not be reasonable but would be the rankest speculation, conjecture, surmise, and supposition. Even the State itself did

not contend in the District Court that such deductions would be authorized, but conceded the offense of bribery was not consummated. Yet, the judgment of conviction pronounces McDonald guilty of "*accepting* a bribe."

McDonald's conviction is void under the Fourteenth Amendment to the Constitution of the United States, and both the District Court and the Court of Appeals erred in holding to the contrary.

B.

THERE WAS A "TOTAL LACK OF RELEVANT EVIDENCE" TO SUPPORT A CONVICTION OF PETITIONER (WHICH DID NOT OCCUR) FOR SOLICITING A BRIBE.

The Court of Criminal Appeals of Alabama, the United States District Court, and the United States Court of Appeals all erred in holding that there was "evidence" within the rule of *Thompson vs. Louisville, supra,* to support a charge that Petitioner unilaterally offered to accept a bribe. McDonald was not tried or convicted of such offense, but, assuming that he was, the evidence must authorize a reasonable deduction that McDonald's alleged remark to the effect that "he said if I met him at Kings Inn we could talk about the situation and maybe take care of it," was in itself an offer to *continue, reduce,* or *nol-pros* Braidfoot's larceny case, or an offer to "otherwise" dispose of it "in a manner beneficial" to her, because the indictment so alleges. *Thompson vs. Louisville, supra.* The alleged remark must also authorize a reasonable deduction that the remark was a proposal to accept sexual intercourse from Myra Braidfoot *as a condition* to the specific things he allegedly offered to give to her. The evidence must authorize a reasonable deduction that McDonald not only *intended* to *propose* the unilateral bribery offer allegedly charged, but

that the proposal was in fact made. Such inferences, or deductions, must be found to be reasonable, in view of the presumption of innocence, and despite the ambiguous nature of the alleged proposal. It must be found that it would be reasonable to deduce that McDonald's alleged proposal to Braidfoot that she meet him at a motel having a restaurant and lounge, as well as sleeping accommodations, at 10:00 o'clock in the morning, was the equivalent of a proposal for sexual intercourse, because such was alleged by the indictment. It must be found that it would be reasonable to deduce from a suggestion to "talk about the *situation* . . . and *maybe* take care of it," that the suggestion was an offer to "nol-pros," "continue," or "dismiss," Braidfoot's case, or "otherwise" to dispose of it "in a manner beneficial" to her, because such are the allegations in the indictment. It is not reasonable, but unreasonable—and therefore not "inference," and not, in law, "evidence"—to deduce a crime from facts equally consistent with no crime, and which, in fact, actually negate the crime. Only by supposition, speculation, surmise and conjecture can the mind leap from the alleged remark to proof, as fact, of the existence of the elements of the offense.

There was a "total lack of relevant evidence" to support even the ex post facto charge of soliciting a bribe, which the Court of Criminal Appeals of Alabama read into the Alabama statute and indictment after Petitioner was tried, and for violation of which the Court of Criminal Appeals of Alabama in practical effect tried, convicted and sentenced Petitioner.

V

The United States Court of Appeals has impliedly decided that, if the only evidence of an alleged criminal act is the uncorroborated testimony of a witness who has been

convicted of crimes involving moral turpitude, a conviction in a state court based exclusively thereon does not violate the Due Process Clause of the Fourteenth Amendment, although, under State law, there is a "violent" presumption against the truthfulness of the sworn testimony of such persons. The question of whether or not a conviction based on such testimony is a violation of due process of law is an important question of Federal law which has not been, but should be, settled by this Court.

At the time Petitioner was tried, Myra Braidfoot was twenty-two (22) years of age. She was nineteen years old at the time of the alleged offense. She had been convicted of three felonies (forgery), and of larceny. At the time of McDonald's trial, she was on probation in connection with the forgery convictions, and she had been a police informer. There was no corroboration of her testimony, or of the testimony of the other "police characters," as the Alabama Attorney General aptly referred in the District Court to the state witnesses against McDonald. McDonald's testimony was exculpatory.

Under Alabama law, there is a "violent presumption," as a matter of law, against the truthfulness under oath of persons convicted of crimes involving moral turpitude. *Smith vs. State*, 129 Ala. 89, 29 So. 699; *Sylvester vs. State*, 71 Ala. 17, *Taylor vs. State*, 62 Ala. 164. McDonald's previous personal and official life were shown to be exemplary. Testimony cannot be "evidence," i.e., have probative force, if there is a legal and "violent" presumption against the truth of the testimony, unless there is other reliable evidence corroborating the testimony. No such corroboration existed in McDonald's case.

The presumption in Alabama against the truthfulness of witnesses who have been convicted of crimes involving moral turpitude is emphatically *not* a presumption which

a jury may draw or not as it deems fit. It is a presumption of law, although a rebuttable one, and it establishes as fact that the witness has testified falsely unless other evidence corroborates the truth of the testimony. The corpus delicti of the offense charged depended exclusively upon Myra Braidfoot's testimony, which fact was conceded by the Court of Criminal Appeals of Alabama. There was no corroboration of her testimony relative to the corpus delicti. Because of the legal presumption against its truth, the *fact* of the falsity of her testimony was established as a matter of Alabama law. It necessarily follows that the conviction was "totally devoid of evidentiary support" under the rule of *Thompson vs. Louisville, supra*, and related decisions of this court hereinbefore cited. Testimony cannot support the existence of a fact if it is presumed false. There is "no evidence" as a matter of law.

The question of whether a conviction in a state court is supported by evidence, under the rule of *Thompson vs. Louisville, supra*, and related cases, when the only testimony tending to establish the elements of the crime charged is presumed false under state law, is an important question of Federal law, which has not been, but should be, settled by this Court. The question was duly presented to the lower courts, but ignored.

CONCLUSION

The Attorney General of Alabama conceded in his brief filed in the United States District Court that *"it is undisputed that the bribe was not consummated."* The judgment of conviction solemnly adjudicates Petitioner guilty of the consummated crime of *"accepting* a bribe," and the trial judge limited the jury's consideration to a bilateral agreement to accept a bribe, and to accepting a bribe. Petitioner's conviction was affirmed by the State appellate court

and relief denied on Habeas Corpus in the lower Federal courts upon the ground that there was not a total lack of relevant evidence to support a conviction of *soliciting* a bribe, which is a separate and distinct crime, with different constituent elements, than the crime of which Petitioner was convicted.

The State appellate court clearly denied Petitioner the due process of law guaranteed him by the Fourteenth Amendment; the lower Federal courts, in their review of the state conviction on Habeas Corpus, not only clearly erred, but also denied Petitioner the due process of law guaranteed him by the Fifth Amendment to the Constitution of the United States in reviewing a state conviction which did not exist, and in failing to review the conviction which did exist, and which was unsupported by evidence.

The Petition for Certiorari should be granted and the Writ of Habeas Corpus directed to be issued as prayed.

Respectfully submitted,

Glenn F. Manning

GLENN F. MANNING
of
Watts, Salmon, Roberts,
Manning & Noojin
P.O. Box 287
Huntsville, Alabama 35804
Telephone 533-3500
A.C. 205

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Glenn F. Manning, attorney of record for Petitioner, Thomas D. McDonald, hereby certify that I have served three (3) copies of the within Petition upon the Honorable Joseph G. L. Marston, III, Assistant Attorney General of Alabama, attorney of record for all Respondents to said Petition, by depositing the same in a United States Post Office, with First Class postage attached thereto and prepaid, and properly addressed to him at his Post Office address at 250 Administrative Building, 64 North Union Street, Montgomery, Alabama, Zip 36130, on the 30 day of September, 1977.

Glenn F. Manning

Glenn F. Manning

APPENDIX

JUDGMENT FOR WHICH REVIEW SOUGHT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1238
Summary Calendar

D. C. Docket No. CA-76-A-1434-NE

THOMAS D. McDONALD,
Petitioner-Appellant,

versus

HON. DAVID HEADRICK, as Sheriff of Madison County, Alabama, CHARLES F. EDGAR, JR., Surety,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

Before GOLDBERG, CLARK and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 20, 1977

OPINION OF COURT OF APPEALS FOR FIFTH CIRCUIT

NO. 77-1238
Summary Calendar
D. C. Docket No. CA-76-A-1434-NE

THOMAS D. McDONALD,
Petitioner-Appellant,
versus
HON. DAVID HEADRICK, as Sheriff of Madison County, Alabama, CHARLES F. EDGAR, JR., Surety,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM.

Thomas B. McDonald takes this appeal from the denial of his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. McDonald was convicted of bribery in violation of Ala. Code, tit. 14, § 64, on the basis of an indictment charging that while a judicial officer, appellant agreed to accept sexual favors or the promise of sexual favors from a woman whose case was pending in his court in exchange for favorable treatment of her case.[1]

[1]Ala. Code tit. 14, § 64 provides:

Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or the clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years.

[1] McDonald contends that the judgment of conviction is invalid because "totally devoid of evidentiary support" regarding one element of the offense. That is, appellant argues that he was charged with and convicted of being a party to a bilateral bribery agreement, whereas the evidence at most showed a unilateral offer by him to accept the bribe. McDonald also argues that even under the theory that he was charged with making a unilateral offer to accept a bribe, there was no evidence to support a conviction.

[2] Alabama courts have interpreted the statute under which appellant was charged to proscribe even unilateral offers to accept bribes. In affirming appellant's conviction on direct appeal, the Alabama Court of Criminal Appeals held that:

> The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value," and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him.

McDonald v. State, 329 So.2d 583, 595 (Ala. Cr. App. 1975), *writ of certiorari quashed as improvidently granted*, 329 So.2d 596 (Ala. 1975), *cert. denied*, 429 U.S. 834, 97 S. Ct. 99, 50 L. Ed. 2d 99 (1976). No Alabama court has construed Ala. Code tit. 14, § 64 to require proof of a bilateral agreement. We find no error in the district court's holding that there was not a total lack of relevant evidence to support the conviction. The judgment below is

AFFIRMED.

ORDER ON REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1238

THOMAS D. McDONALD,
Petitioner-Appellant,

versus

HON. DAVID HEADRICK, as Sheriff of Madison County, Alabama, CHARLES F. EDGAR, JR., Surety,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING
(July 20, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

JUDGMENT OF U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

THOMAS D. McDONALD *Petitioner*	)	
v.	)	CA-76-A-1434-NE
HONORABLE DAVID HEADRICK, AS SHERIFF OF MADISON COUNTY, ALABAMA; CHARLES F. EDGAR, JR., SURETY, *Respondents*	)	

ORDER

On December 3, 1976, the United States Magistrate made his report and recommendation to this Court concerning the petition for habeas corpus filed by Thomas D. McDonald. Exceptions to the Magistrate's report were filed by the Petitioner. The Petitioner's exceptions to the Magistrate's report were accompanied by a Memorandum. The State of Alabama, on behalf of the Respondents, did not file an exception to the Magistrate's report and recommendation but did submit a brief Memorandum.

The petition for habeas corpus by Thomas D. McDonald presents a most difficult decision for this Court to make. The Courts feels great compassion for the Petitioner who formerly served as a judicial officer in Madison County, Alabama. The Court feels, however, that it must reluctantly accept the recommendation of the United States Magistrate.

The only constitutional issue before this Court is whether there was a total absence of evidence to support Petitioner's conviction. The Court has examined the pleadings, exhibits, and the excellent briefs submitted by the parties. In spite of a great feeling of compassion for the Petitioner, this Court cannot say that there was a total absence of evidence upon which the conviction was based.

It is therefore ORDERED that the petition for habeas corpus filed by Thomas D. McDonald be and the same hereby is DENIED.

The Clerk will mail copies of this Order to the parties by mailing a copy to their respective attorneys of record.

DONE this 29th day of December, 1976.

/s/ C. W. ALLGOOD

United States District Judge

REPORT OF THE MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

THOMAS D. McDONALD, *Petitioner*	)	
v.	)	CA-76-A-1434-NE
HONORABLE DAVID HEADRICK, A SHERIFF OF MADISON COUNTY, ALABAMA; CHARLES F. EDGAR, JR., SURETY, *Respondents*	)	

EXAMINATION AND REPORT TO THE UNITED STATES DISTRICT COURT

Thomas D. McDonald, hereinafter referred to as Petitioner, has filed in this Court a petition for habeas corpus in which he attacks his conviction in the Circuit Court of Madison County, Alabama. In accordance with the practices of this Court, this matter was referred to the undersigned Magistrate for the purposes of a preliminary review and recommendations to the District Court. The State of Alabama was directed to respond to a show cause Order. The response of the State has been filed. The response filed by the State of Alabama includes the entire transcript of the proceedings in which Petitioner was convicted, together with other exhibits. Petitioner has filed a Traverse, together with several exhibits including briefs filed by the Petitioner on direct appeal. In addition, this Court has been favored by excellent memoranda submitted by very able counsel for Petitioner and for the State of Alabama.

Prior to his indictment and conviction, Petitioner was the Judge of the Madison County Court. On May 23, 1973, an indictment was returned against Petitioner by a grand jury of Madison County, Alabama. The indictment contained several counts, however, only Count One of the indictment was submitted to the jury, and Petitioner was convicted after trial by jury of the offense described in Count One of the indictment.

The conviction of Petitioner, which is now under attack, occurred in Case No. 73-367-F in the Circuit Court of Madison County, Alabama. The trial was concluded on March 7, 1974, and Petitioner was sentenced to confinement for a period of three (3) years. Petitioner perfected a direct appeal to the Alabama Court of Criminal Appeals. Petitioner's conviction was affirmed by the Alabama Court of Criminal Appeals—*McDonald v. State*, 329 So.2d 583 (1975). The Supreme Court of Alabama issued a writ certiorari to review the decision of the Alabama Court of Criminal Appeals; subsequently, the Supreme Court of Alabama quashed the writ of certiorari. *McDonald v. State*, 329 So.2d 596 (1976).

After the aforementioned action by the Supreme Court of Alabama, Petitioner filed an application for certiorari in the Supreme Court of the United States. Certiorari was denied by the Supreme Court of the United States on October 4, 1976. ..... U.S. .....

The only issue raised by Petitioner which authorizes this Court to review Petitioner's conviction in the state courts of Alabama is Petitioner's contention that there was a total absence of evidence as to the essential elements of the crime charged in Count One of the indictment upon which Petitioner was convicted. This issue was strenuously raised by Petitioner during the trial of the case, motion for new trial, appeal to the Alabama Court of Criminal Appeals, appli-

cation for rehearing in the Alabama Court of Criminal Appeals, petition for certiorari to the Supreme Court of Alabama and petition for certiorari to the U.S. Supreme Court. Petitioner has exhausted all available state remedies. It is therefore proper for this Court to consider the merits of the petition for habeas corpus filed by the Petitioner.

Count One of the indictment, which was the only count of the indictment upon which Petitioner was convicted, charged as follows:

> "Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity, or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the *State of Alabama v. Paul Duane Braidfoot, Myra Layton Baridfoot, Defendants*, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias

Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama."

In proving the case against Petitioner, the State relied on the testimony of one Myra Layton Braidfoot, the person identified in Count One of the indictment. The material portion of the testimony of this witness is set out below:[1]

"Q. What happened the third time, please ma'am?
"A. Well, we were in his chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.
"THE COURT: Asked you what?
"A. If I could meet him at Kings Inn at 10:00.
"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.
"THE COURT: All right. I'm just a little hard of hearing.
"Q. Did he touch you or anything that time, squeeze you?
"A. He put his arm around my waist.
"Q. This Defendant, Thomas McDonald?
"A. Yes, sir.
"Q. And were you alone in his office?
"A. Yes, sir.
"Q. And what again did he say now, other than meeting him at the Kings Inn?
"A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.

[1]The State of Alabama offered to the jury, and the Court permitted, the testimony of several additional female witnesses who claimed that at the request of Petitioner, they had exchanged sexuals favors for judicial leniency. This evidence was received by the trial court for the purpose of showing intent, design and motive only.

"Q. Of the case?
"A. Yes, sir.
"Q. All right. If you met him at Kings Inn at 10:00, what did you tell him?
"A. I told him that I would."

The testimony of Myra Braidfoot and contacts with Petitioner preceding her quoted testimony are set out in the opinion of the Alabama Court of Criminal Appeals as follows:

"At trial Myra Layton Braidfoot testified she had been arrested in Madison County on a charge of 'conspiracy of larceny'. Between November and December, 1971, she appeared in Judge Thomas D. McDonald's court three times, and on each occasion, she saw appellant in his chambers.

The first time, she was told by the bailiff that the judge wanted to see her. While in the judge's chambers, she sat on a couch and appellant sat in a chair behind his desk. Although she couldn't remember the extent of their conversation, she did recall the judge commented about how attractive she was.

When she was called into the judge's chambers the second time, he again remarked how attractive she was. She did not recall anything else about their conversation."

Petitioner's contentions may be summarized as follows: Petitioner contends that before Petitioner could have been convicted under Count One of the indictment, the evidence must have established an agreement between Petitioner and Myra Braidfoot that she would give and Petitioner would receive sexual favors, and an agreement or understanding between Petitioner and Myra Braidfoot that Petitioner would dispose of her pending case in a manner beneficial to her. Petitioner further contends that the state was required to prove that Myra Braidfoot must have promised sexual favors under an agreement that Petitioner

would, in response thereto, grant her judicial leniency. Finally, Petitioner contends that the conviction of Petitioner is void for the reason that there was no evidence received by the jury to establish the essential elements of the crime. By way of brief summary, the Petitioner's contentions may be described as follows: Before Petitioner could have been found guilty of the crime charged in Count One of the indictment, there must have been evidence of a bilateral agreement between Petitioner and Myra Braidfoot. Such agreement being that Petitioner would accept and Myra Braidfoot would give sexual favors in exchange for judicial leniency. In support of his contention, Petitioner points out that despite Myra Braidfoot's statement to Petitioner that she would meet him at the Kings Inn Motel, this meeting never occurred, nor did Petitioner ever have sexual relations with Myra Braidfoot.

The State of Alabama contends that the charge made in Count One of the indictment essentially was that Petitioner agreed to accept sexual favors. The State of Alabama paraphrases language used in the indictment as accusing Petitioner of offering to accept a bribe.

If this Court were in the position of a "fact finder" or if this Court were reviewing the conviction of Petitioner on direct review, the contentions made by Petitioner might very well persuade this Court to agree with the position taken by the Petitioner. However, a federal habeas court reviewing the conviction of a state prisoner is limited to federal constitutional questions raised in the petition for habeas corpus. Sufficiency of the evidence presented to the trial court is not properly before this Court. *Jackson v. Alabama,* 534 F.2d 1136 (5th Cir. 1976); *Jenkins v. Wainwright,* 488 F.2d 136 (5th Cir. 1973); *Pleas v. Wainwright,* 441 F2d 57 (5th Cir. 1971); *Summerville v. Cook,* 438 F.2d 1196 (5th Cir. 1971).

Interpretation of a state criminal statute and the determination of the elements of the crime necessary for a conviction are not properly before a federal habeas court. *Gueldner v. Heyd,* 438 F.2d 1307 (5th Cir. 1970); *Hall v. Wainwright,* 493 F.2d 37 (5th Cir. 1974); *Flanigan v. Beto,* 437 F.2d 895 (5th Cir. 1971).

It is elemental that if a habeas corpus Petitioner has been convicted of a state offense and the record reflects a total absence of evidence, such a Petitioner has been denied due process of law, and therefore, his conviction cannot stand. On habeas review, if the District Court finds a total absence of evidence, the District Court is compelled to grant the petition for habeas corpus. On the other hand, if the conviction is supported by evidence which was obtained and received in compliance with constitutional safeguards, the U.S. District Court cannot issue a petition for habeas corpus on the theory that the evidence was weak or insufficient.

The issue before this Court was raised in the appellate courts of Alabama and was decided adversely to the Petitioner. The issue was also raised by Petitioner in his attempt to secure certiorari in the Supreme Court of the United States. This attempt was also unsuccessful.

This Court is bound by the statutory construction of Alabama criminal statutes made by the appellate courts of Alabama. The Alabama appellate courts have determined that the evidence introduced at Petitioner's trial supported his conviction. This Court does not have the authority to substitute its judgment for that of the appellate courts of Alabama.

The Magistrate has carefully considered the authorities cited by able counsel for Petitioner in support of his petition. The holding in these cases is, of course, beyond dispute—that is, a conviction totally unsupported by evi-

dence cannot stand. However, the Magistrate concludes that this unassailable principle does not apply in the instant case.

It is the Magistrate's recommendation that this Court find that the record of the state court reflects that there was evidence to support Petitioner's conviction and therefore, no constitutional issue is presented to this Court.

It is therefore recommended that the petition for habeas corpus be denied.

Copies of this recommendation have been mailed to counsel for Petitioner and for the State of Alabama. Any objections or exceptions to the Magistrate's report and recommendation should be filed within ten (10) days from the receipt of the Magistrate's report and recommendation.

DATED this 3rd day of December, 1976.

/s/ R. Macey Taylor

UNITED STATES MAGISTRATE

MAY 27, 1975

OPINION OF COURT OF CRIMINAL APPEALS OF ALABAMA

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1974-75

8 Div. 524

Thomas D. McDonald
v.
State
Appeal from Madison Circuit Court

DeCARLO, JUDGE

Thomas D. McDonald was convicted of bribery and sentenced to three years. All of the judges of the 23rd Judicial Circuit recused themselves. The Chief Justice, Howell T. Heflin, assigned the Hon. L. S. Moore, Supernumerary Circuit Judge, to preside over this case.

Before trial, appellant filed a plea in abatement based upon fraud and other irregularities in making up the jury box from which the grand jury returning the indictment was drawn. Appellant also filed a written waiver of his right to jury trial on the grounds of extensive pre-trial publicity, but did not file a motion for change of venue. Both the plea in abatement and the motion to waive a trial by jury were properly overruled by the court. *Shields v. State*, 52 Ala. App. 690, 296 So. 2d 786.

On appeal, appellant also challenges the court's action in hearing the evidence on the plea in abatement without a jury. The record does not reflect an objection by defense counsel and failure to submit this matter to a jury was not

prejudicial to appellant. *Racine v. State*, 291 Ala. 684, 286 So. 2d 896.

Appellant was charged by a four-count indictment with violations of T. 14, § 64, Code of Alabama 1940, Recompiled 1958, in accepting a bribe or agreeing to accept a bribe. A plea in abatement and demurrer thereto were overruled.

After an election by the State, the case was submitted to the jury on count one which reads:

> "Thomas D. McDonald, alias Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity, or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecution being otherwise identified as the State of Alabama vs. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants, Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nopros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama."

This count is based on T. 14, § 64, Code of Alabama, which provides:

> "Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or any clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years."

At trial Myra Layton Braidfoot testified she had been arrested in Madison County on a charge of "conspiracy of larceny." Between November and December, 1971, she appeared in Judge Thomas D. McDonald's court three times, and on each occasion, she saw appellant in his chambers.

The first time, she was told by the bailiff that the judge wanted to see her. While in the judge's chambers, she sat on a couch and appellant sat in a chair behind his desk. Although she couldn't remember the extent of their conver-

sation, she did recall the judge commented about how attractive she was.

When she was called into the judge's chambers the second time, he again remarked how attractive she was. She did not recall anything else about their conversation.

Her testimony as to the third occasion was:

"Q. What happened the third time, please ma'am?
"A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.
"THE COURT: Asked you what?
"A. If I could meet him at Kings Inn at 10:00.
"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.
"THE COURT: All right. I'm just a little hard of hearing.
"Q. Did he touch you or anything that time, squeeze you?
"A. He put his arm around my waist.
"Q. This Defendant, Thomas McDonald?
"A. Yes, sir.
"Q. And were you alone in his office?
"A. Yes, sir.
"Q. And what again did he say now, other than meeting him at the Kings Inn?
"A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.
"Q. Of the case?
"A. Yes, sir.
"Q. All right. If you met him at Kings Inn at 10:00, what did you tell him?
"A. I told him that I would."

Only she and appellant were present on each of the three visits, and during this period of time, her case was being continued. Following the last visit, she reported the incident to her lawyer in Decatur, and the case was later transferred to another court.

Judge Thomas D. McDonald, Judge of the General Sessions Court of Madison County, since January 1, 1974, and prior to this time, Judge of the Madison County Court, testified in his own behalf. He recalled that on December 9th or 16th of 1971, about 9:30 A.M., he sent either his bailiff or clerk to summons Myra Braidfoot to his chambers. She was alone, and either he or the bailiff closed the door. He sat at his desk and she sat on the sofa or a chair. He informed Myra Braidfoot her attorney would be late. They discussed her charges, but he did not recall telling her she was attractive. He denied asking her to meet him at the Kings Inn, but stated he may have taken her arm and escorted her to the door.

He stated the morning docket had not been completed. Ordinarily court was recessed after the first call until 10:00 A.M., and sometimes preliminary hearings would continue into the afternoon.

I

Appellant's demurrer to the indictment contained 84 grounds, and he insists the judge erred in overruling it. In its brief, the State grouped these grounds under four general arguments, and the court's action will be evaluated in this context.

1. The indictment does not apprise the accused with reasonable certainty of the act or acts with which he is charged.

No code form exists in Alabama, for the offense denounced in T. 14, § 64, supra. The indictment charged the offense in the words of the statute, *Harris v. State*, 32 Ala. App. 519, 27 So. 2d 794, and it sufficiently recited the essential elements of the offense of bribery. The requisite general description of the offense was apparent. *Caruthers v. State*, 74 Ala. 406.

Identification of the accusation was sufficient to enable the accused to prepare his defense and permit the court to pronounce a proper judgment on conviction. *Fitzgerald v. State*, 53 Ala. App. 663, 303 So. 2d 162.

2. The indictment charges "two separate offenses" in the alternative.

Alternative joinder of offenses is expressly provided for in T. 15, § 249, Code of Alabama.

Where a statute specifies several ways in which an offense may be committed, they may be charged in one indictment or count using conjunctions to connect them. *Arellanes v. U. S.*, 302 F. 2d 603.

3. It does not specify the nature of the "gift, gratuity, or other thing of value" accepted by appellant.

The gift, gratuity, or other thing of value averred in the indictment was ". . . Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot . . ."

12 Am Jur 2d Bribery § 7, states this test for determining value:

> "It seems that a bribe must involve something of value that is used to influence action or non-action. Value, though, is determined by the application of a subjective, rather than an objective, test, and the requirement of value is satisfied if the thing has sufficient value in the mind of the person concerned so that his actions are influenced."

In *Caruthers v. State*, supra, Judge Somerville wrote:

> "The word 'thing' does not necessarily mean a substance . . . . [I]t includes an act, or action."

The Ohio court recognized in *Scott v. State*, 141 N.E. 19, that it is impossible to establish value which is universal. Further, the court stated: "The test of the value must

necessarily be the desire of some person or persons, not necessarily of most persons or all persons, for the thing in question." In conclusion, the court held that sexual favors solicited in exchange for official action was a sufficient thing of value.

4. The indictment did not specify the official duties of the accused sought to be corruptly influenced.

The official duties were generally stated in this manner:

> ". . . [T]hat his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity . . ."

and more specifically:

> ". . . [W]ould dismiss or cause to be dismissed, nolpros or cause to be no-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot . . ."

The law does not protect a corrupt judge because he exceeds his powers, and his actions are "colorable" only. *People v. Jackson*, 191 N.Y. 293, 84 N.E. 65; *Wells v. State*, 129 S.W. 2d 203; *Whitney v. U. S.*, 99 F. 2d 327.

The gravamen of the offense is the acceptance and solicitation of the bribe to influence his official conduct. *Sharp v. U. S.*, 138 F. 878.

II

To sustain its burden of proof, the State offered evidence of similar transactions to show intent, motive, design and scheme. This evidence involved four other females having matters coming before appellant's court and the attending facts relative to their transactions with appellant.

Appellant insists the trial court erred in allowing this evidence and urgently contends that the testimony of Cheryn Forsythe, Brenda Gwathney, Laura Blann, and one other whose anonymity was preserved, was palpably erroneous and prejudicial.

The facts as related by Cheryn Forsythe were:

In March, 1971, she came before Judge McDonald on a charge of issuing a worthless check to Tourway Inn. After a demand for preliminary hearing, the charge was amended on motion of the District Attorney, and she pleaded guilty. Upon payment of the fine and costs, the sentence was suspended for restitution. After restitution, the jail sentence was remitted.

On April 1, 1971, she was arrested on a fugitive warrant growing out of a probation violation in the State of Ohio. This case was continued from time to time on her own motion and prosecution was dismissed on May 27, 1971.

At the time she was arrested on the Tourway Inn check, Billy Eades, a city policeman, accompanied her to Judge McDonald's office. The officer asked the judge to help her because she was working with the police. At that time, the Tourway Inn check and the Ohio flight warrant cases were pending against her. After Officer Eades talked to Judge McDonald, she remained out of jail and continued to help the police.

In October, 1971, she as before appellant's court for issuing a worthless check to Southern Airlines. On advice of the bailiff, she went to the judge's chambers to discuss the case. The judge advised her to get a lawyer, and the warrant, being defective, was dismissed. Subsequently, she was re-arrested on a new warrant and went to see appellant in his chambers. Her testimony was:

"A. He asked me if I could meet him in his Chambers — I mean meet him. I asked why, he said

he wanted to talk to me and that he could get it taken care of.

"Q. Get the case taken care of?

"A. Yes."

Either that day or the next, she met appellant at the parking lot of the Big Gun Store and followed him in her car to George Fann Realty. It was just after dark when they arrived and both went into the office. After talking for awhile, the judge mixed himself a few drinks but the witness did not have any. She testified that after having sexual intercourse with the judge on the couch, he told her to bring the money by in a few days to pay the check. Eventually she took the money to him and never went back to court on that case.

In October, 1972, she was arrested on nine worthless check cases and after going to the sheriff's office, three additional warrants were placed against her. Again, she went to the appellant's office. He told her she could make a personal bond on those warrants and not to worry, that she wouldn't need a lawyer. She was directed to plead guilty and get the money to pay the checks. At this time, she was pregnant, and the judge put his arms around her back and buttocks and tried to kiss her.

After this meeting she went to court every Tuesday and when a check appeared on the docket, appellant asked if she had the money to make restitution. If she had it, it was paid, and if not, she was given two or three weeks to pay the check. Each time she would plead guilty, the sentence was suspended and after payment of court costs the sentence was remitted.

In March, 1973, she was arrested on other worthless check cases. It was about this time that newspaper publicity was released concerning Judge McDonald's handling of her cases.

After the arrest, she called the judge from jail, to see if she could make a cash bond. She was told a friend would do it, and that was all he could do for her.

In April, 1973, she testified before the Madison County Grand Jury and after two days of testimony, she related to the jury the circumstances involving her relationship with Judge McDonald.

Judge McDonald testified Cheryn Forsythe had three worthless check cases and a bigamy case pending in the Madison County Court. The warrants on the check charges were executed on October 2, 1972, and continuances were given from time to time. On her appearances in court on these cases, she was sentenced to thirty days. Subsequently, some police officers told him she was working as an informer on a series of robberies and they requested him to keep her out of jail. He agreed to cooperate and saw to it that she was not imprisoned. She received a thirty day sentence. It was suspended pending payment of fine, and later this sentence was suspended.

She had been to his office once on the Southern Airline case and again on a board and lodging case when accompanied by the police. He did not ask her to meet him at a parking lot, Governors Drive, or at the Big Gun Store, and did not go to Fann Realty with her. When he was consulted on the worthless check warrants, he encouraged her to make restitution. He denied kissing or putting his arm around her at any time.

As to Brenda Gwathney, the evidence submitted was: In August, 1972, she went to Judge McDonald's court to answer a worthless check charge. She entered a plea of guilty and made restitution on that date. Not having enough money to pay the fine, appellant continued the case so she could get the money. The case was suspended for payment until September 5, 1972, and when she was unable to pay,

she went to see Judge McDonald. While talking to him in his chambers, he asked where she lived and worked. As she got up to leave, appellant tried to kiss her and said he would give her another week or so.

The case was again continued at her request to October 10, 1972. At the October setting, she was late for her appearance in court and went to the judge's chambers again. She still didn't have the money to pay the fine and was upset because of the pending jail sentence. Judge McDonald sympathized and continued the case. As she was leaving, he put his arms around her and kissed her. The door to the judge's chambers was closed on each occasion. Her testimony about the last visit was:

"A. He asked if I could get out at night and I told him no, that I couldn't.
"Q. Did he say anything about your case?
"A. Just that he would give me all the time that I needed."

The last day she went back to court, she didn't see Judge McDonald, but was informed by one of the girls in the office that her case had been dropped.

Judge McDonald stated to his knowledge, Brenda Gwathney was not sentenced to jail on her first appearance in his court. The case was continued several times. One continuance was due to a death in her family.

Restitution had been made on the check, and the fine and costs were remitted. On the occasion she came to his chambers, he recalled putting his arm around her and escorting her to the door. He denied kissing her or asking her if she could get out at night.

The facts relating to Laura Blann as disclosed by the record were: In October of 1972, she appeared in Judge McDonald's court on a forgery charge.

At her first appearance, the preliminary hearing was "overruled", but she continued to return because of additional charges. Testimony regarding her first conversation with appellant was:

"Q. All right. Now, tell the Court and the jury, please, exactly what happened that time when you first had a conversation with the Judge.

"A. He asked me to come to his office, that he would like to talk about my cases with him. So, I went in his office alone, leaving my husband standing outside, and he said, 'Well, I'm concerned about all these forgery charges you have.' Said, 'How have you got them?' I explained to him that I had done it and that they had sent my checks up for fingerprints and that they was coming back just one at a time, they would arrest me as they came in.

. . . .

"Q. You told the Judge you were guilty, you had done it?

"A. Yes, sir. He told me not to ever plead guilty.

"Q. The Judge told you what then?

"A. He told me not to worry about it and not to plead guilty, that he would talk for me and he would get everything squared away.

. . . .

"A. He said, 'Don't plead guilty to anything, regardless of what it is, because you always have a chance of beating it in Court.'

"Q. The Judge told you that?

"A. Yes, sir.

"Q. Before he said that, had he said anything to you — had he given you any compliments or anything like that, or did he just get right into it?

"A. Yes, he told me I had beautiful eyes.

"Q. Go ahead. What, if anything, happened?

"A. Then he told me not to worry about the bigamy charge, that the State wouldn't prosecute a woman on bigamy anyway.

. . . .

"Q. Did he touch you in any way?
"A. Yes. He put his hands on me.
"Q. Where were you seated?
"A. I was sitting on his sofa in his office.
"Q. Where was he?
"A. He was sitting beside me, when I got up to leave he put his arm around me and he tried to kiss me, and I turned my head and he did kiss me on my cheek.
"Q. He tried to kiss you on the mouth?
"A. Yes.
"Q. Where all did he touch you? Just tell the Court and jury.
"A. He touched me on my breast and he rubbed my leg.

. . . .

"A. He asked me did my husband follow me around and was there any possible way I could meet him, and then he said, 'Well, we better go back in the Courtroom. The recess is over.'
"Q. You didn't give him an answer at that time?
"A. No.
"Q. Did he ask you to call him?
"A. Yes, he told me I could call him any time I needed him, any time that I was arrested and needed a bond dropped, or either — any of my friends that needed any help in getting their bond cut down, he would help."

The next conversation she had with appellant was when she was arrested on forgery and "pretense" charges and placed in the Madison County Jail. She telephoned the judge to continue her preliminary hearing. He told her the case would be set up, but she should call him when she got home.

After a couple of days, she phoned the judge and was asked to come to his office that afternoon. He explained one had to be careful talking over the telephone. Upon arrival at his office, the judge locked the door and asked if she would like a drink. When she refused, he said he was a "scotch man" and gave her a bottle of bourbon. He again put his hands on her and tried to kiss her. She was asked to meet him at the Tourway Inn and was told he would give her a room key. She responded that she had a dental appointment and couldn't meet him.

On the night of April 27, 1973, she was in the Madison County Jail with Cheryn Forsythe, but denied Cheryn made any suggestion that she, Laura Blann, could help herself by testifying against the judge. She also denied having been shown any map of the judge's office.

Appellant testified he did not know Laura Blann until her case came before his court but remembered having one conversation with her in his chambers.

She approached him at the door of his office and asked to speak to him. It was just before 10:00 A.M., and to his knowledge, he did not lock the door. He sat at his desk and she sat on the couch or in a chair.

A bigamy charge was pending against her, and he advised her to have a lawyer; that she was presumed to be innocent, and if so, should not plead guilty. Nothing was mentioned about her calling him, and he did not recall any occasion when he offered her a drink. He did not give her any whiskey and did not ask her to meet him at the Tourway Inn.

No offer of a key to Tourway Inn or to help her friends was made, nor did he rub her leg or kiss her.

As to the anonymous witness, the testimony was:

Around March, 1971, an auto theft charge against her brother was pending in appellant's court. She went to the

judge to ask if a bond could be set and was told it would cost a hundred dollars for his release.

After borrowing the money, the bond was made and appellant arranged for her brother to be brought down to the courtroom. While they were waiting for her brother, the following occurred:

"A. While they were bringing my brother down my mother was sitting out in the lobby, and the Judge said that he would like to meet me some other place and talk to me about my brother.
"Q. Your mother didn't hear this did she?
"A. No.
. . . .
"Q. And so the Judge said what now?
"A. He said that he would like to meet me some other place and talk to me about my brother's case.
"Q. What, if anything, did you say?
"A. I said okay.
"Q. What, if anything, did he do then or say?
"A. He said that I would meet him at Fann Realty at 7:00.
. . . .
"Q. No. Did you go with the Judge or did you drive your own automobile or what?
"A. I drove my own automobile.
"Q. Did you know where to go?
"A. No, I followed the Judge.
"Q. Where did you meet up with the Judge?
"A. Out here in front of the Courthouse.
"Q. And you followed him?
"A. Yes, I did.
"Q. And when you got to Fann Realty, did you go inside?
"A. Yes, I did.
"Q. Did you go in together or how?
"A. Yes, I think he was waiting in the car when I pulled in.

"Q. What, if anything, happened then? Go ahead and tell the jury and Court what, if anything, happened.
"A. I went inside and I thought that I was going to talk to the Judge about my brother.
"MR. MANNING: We object to what she thought.
"THE COURT: You object to what?
"MR. MANNING: I'm objecting to a mental operation. She testified to what she thought.
"A. No, I'm testifying to what I thought.
"Q. Just tell what you said, what he said, what you did and what he did. Now, what, if anything, happened after you got inside, what did the Judge say or do?
"A. I went inside with the Judge. I was sitting there, I was ready to talk to him about my brother's case because I knew that he was not guilty of taking the car. I did not go there —

. . . .

"Q. Did he get you a drink before that or did y'all have a drink?
"A. No, I didn't.
"Q. He fixed himself one?
"A. Yes.
"Q. After he fixed himself a drink, what did he do?
"A. He asked me to take my clothes off.
"Q. Did y'all have sexual relations there at the time?
"A. Yes.
"Q. After he finished, what, if anything, did he say to you? Did he ask you to call him?
"A. Yes, he did."

She next saw the Judge in reference to a speeding ticket and asked that payment be postponed until she could get the money. Later she received a letter indicating she would be in contempt if she did not come to court. When she saw the judge in his chambers, he told her the case had been continued but the letter was his only way of getting to see her. While they were in his chambers alone, he walked up

behind, reached under her arms and starting feeling of her breasts. She asked him "to let her go" and she left. He did tell her he would continue her case again.

Later in 1973, she again met the judge at Fann Realty concerning a peace bond against her husband. She had known appellant for about ten years and had seen him a few times in the clubs where she had worked as a barmaid.

Judge McDonald testified this witness would sometimes stop by his office on her way to the Registrar's office. In March, 1973, she came to see him in his office regarding a criminal charge pending against her brother. She wanted to get him out of jail and appellant advised her that a hundred dollar bond would have to be made. A cash bond was posted and her brother was released.

He denied asking her to meet him at Fann Realty or any other place. In February, 1973, she wanted a peace bond, and in March, telephoned him at home about another peace bond.

He told her to meet him at the courthouse basement. Arriving about 6:15 P.M., he said they would have to talk at the jail and she asked if they could talk elsewhere. Ultimately, they drove to a large parking lot. He sat in her car while they discussed the peace bond. After the conversation they each left in separate cars.

On the way home he stopped and greeted a friend at Fann Realty. Subsequently, the above mentioned witness walked in and after a short while the three left. He talked with her a minute in the parking lot concerning a speeding ticket.

He did not ask her to remove her clothes, and did not have sexual relations with her. At no time afterwards did he ever see her at the Fann Realty office.

He denied ever having a key to the back door of Fann Realty. The only time he had keys to the front door was

when he hung pictures in the office, and these were left in the door when he finished.

Numerous grounds have been urged upon this court for a reversal of the judgment and although each and every one was considered separately and severally, only the pertinent ones will be reviewed here. In that regard, we believe the principal question necessary for rendering a decision in this matter involves the admission of "similar transactions" to show intent, motive, design and scheme.

It is a well recognized rule that in a prosecution for a particular offense, proof tending to show that accused is guilty of committing other crimes at other times is inadmissible, even though they are similar to the one charged in the indictment. *Gassenheimer v. State*, 52 Ala. 313.

The opinions in *Fall v. U. S.*, 49 F. 2d 506, *White v. State*, 159 S. E. 897, *Scott v. State*, supra, and *Roden v. State*, 5 Ala. App. 247, 59 So. 751, sufficiently cover the rule governing admission of testimony about similar transactions of the defendant in bribery cases.

It is well to note, however, that although the general rule excludes evidence of similar offenses for the purpose of showing bad character of the accused, exceptions are recognized if relevant for any purpose other than to show a mere propensity by the defendant to commit the crime charged. *Gassenheimer v. State*, supra; *Dennison v. State*, 17 Ala. App. 674, 88 So. 211.

In our determination of this issue involving the admission of "similar transactions," we assessed the testimony in the light of certain limitations outlined by defense counsel.

First, we found that a connection and pattern existed between the similar transactions and the offense charged. This was indicated by the following facts from the testimony of the four witnesses:

1. All were women defendants or were interested in matters pending before the judge.
2. Each one went to the judge's chambers.
3. After each entered, the door was closed.
4. Each one was alone with the judge in his chambers.
5. Judge offered each aid or help in matters pending before him.
6. The judge hugged, kissed or touched each.
7. All were asked to meet the judge.

Second, appellant's transactions with the respective witnesses were not too remote in time; *U. S. v. Cochran*, 499 F. 2d 380, and occurred within these intervals:

Braidfoot	November - December, 1971.
Forsythe	October, 1971 - October, 1972.
Gwathney	September - October, 1972.
Blann	December, 1972 - January, 1973.
Anonymous	March, 1971 - March, 1973.

Third, evidence of the similar transactions was admissible even though the proof shown was not sufficient to prove the similar offenses beyond a reasonable doubt. *Scott v. State*, supra.

Fourth, the general rule excluding evidence of similar transactions does not apply when it is material to the inquiry to show the intent with which the act charged was committed. *Roden v. State*, supra.

After admission of this evidence, in order to insure that no prejudice accrued to appellant, the trial judge admonished the jury as to the purpose of the evidence and at the close of the trial, again instructed the jury in this manner:

> "Now, the State has made an effort to show by that evidence that the Judge has committed some other similar offenses, that is, similar to the ones [sic] charged in the Indictment, and the State, contends that

he did commit other similar offenses. Now, once again, I'm not saying whether that contention on the part of the State is true or false, but it does present an issue, it's for the jury to say whether it's true or false. At the conclusion of that kind of evidence I limited that evidence, as you remember, to your consideration of the question of the intent that the Judge may or may not have had in the case that we are trying, and to the scheme or plan or action that he may have had in his dealing with this Braidfoot woman named in the Indictment.

. . . .

"Now, we are not trying him for these other offenses, it's merely evidence, and that evidence is to be limited in your consideration of the case that we are trying, as to the question of intent, scheme or plan"

Based on the foregoing, our judgment is the court's action in admitting the testimony of similar transactions showing intent, motive, design and scheme was proper.

III

It is strongly insisted by appellant that the evidence was insufficient to authorize a conviction.

To constitute an offer to accept a bribe, the thing solicited must be valuable and may be some act. *Caruthers v. State*, supra.

The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value", and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him.

Although the evidence before the jury was in dispute, it could be inferred from this statement in Braidfoot's testimony, "if I met him at the Kings Inn we could talk about the situation and maybe take care of it," appellant was asking for a "thing of value" or an "act beneficial to" himself.

The word "value" is not limited to desirable things generally received in bribery cases. The test of value is the thing in question. *Scott v. State*, supra.

Authorities have shown that relevant, similar transactions as those committed by appellant are admissible. *Fall v. U. S.*, supra; *White v. State*, supra; *Scott v. State*, supra; and *Roden v. State*, supra.

Appellant argued the "pattern" evidence was inadmissible as nothing of value was solicited of Braidfoot or the others. A similarity between the Braidfoot matter and the pattern testimony is apparent. It could reasonably be inferred that appellant's intent, motive, design and scheme in all of the transactions were the same and it was his intent to exchange his high judicial functions for what he personally desired.

Where there is legal evidence, as in this case, from which the jury can by fair inference find the accused guilty, this court has no right to disturb the verdict. *Haggler v. State*, 49 Ala. App. 259, 270 So. 2d 690.

AFFIRMED.

All the Judges concur.

DECISION AND DISSENTING OPINION ON APPLICATION FOR REHEARING

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1974-75

8 Div. 524

Thomas D. McDonald
v.
State
Appeal from Madison County Court

JUNE 30, 1975

ON REHEARING

APPLICATION OVERRULED.

Cates, P. J., Tyson, Harris and DeCarlo, J. J., concur.

Bookout, J., dissenting:

The indictment charges that appellant, ". . . did . . . unlawfully and corruptly accept or agree to accept . . . a promise to do an act beneficial to the said Thomas D. McDonald, . . . , to-wit: Sexual intercourse, the promise of sexual intercourse . . . from one . . . Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, . . . , being a criminal prosecution of said Myra Layton Braidfoot, . . . , charged with Grand Larceny under the laws of the State of Alabama," and that he "would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or cause to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to said Myra Layton Braidfoot . . ."

Mrs. Braidfoot testified that on her third visit to the Judge's chambers, "he said if I met him at the King's Inn we *could talk* about the *situation* and *maybe* take care of it." She told him she would meet him there. Appellant made no promise or agreement to do anything specifically about the case. He only agreed "to talk about the situation and *maybe* take care of it." (Emphasis supplied).

The appellant's conduct with other women certainly shows pattern, motive, or intent, however, intent alone is insufficient to support the positive averments spelled out in the indictment. The above conversation lacked specificity of action by the appellant as charged in the indictment. On reviewing the evidence, I am unable to find an actual promise or agreement that appellant would dismiss or nol-pros Mrs. Braidfoot's case in exchange for her favors. He suggested meeting and talking, and although we may believe from his pattern of conduct he would make an illegal proposition, nevertheless, we do not know for he never got to that point.

After considering the application for rehearing, I have sufficient doubt that I now believe the seriousness of the case and charges involved deserve our review on rehearing.

JUDGMENT OF CONVICTION AND SENTENCE

STATE OF ALABAMA — IN THE CIRCUIT COURT
MADISON COUNTY — CASE NO. 73-367F
STATE OF ALABAMA — PLAINTIFF

VS.

THOMAS D. McDONALD — DEFENDANT

This day, February 25, 1974, in open Court came the State of Alabama by its Attorney General and the Defendant in his own proper person and with his counsel and this cause coming on to be heard on the 25th day of February, 1974 and the defendant having been theretofore duly and legally arraigned upon the indictment in this cause and having entered a plea of not guilty thereto and issue being joined. Thereupon a jury of good and lawful jurors were empanelled and duly sworn in accordance with the law to try said case and cause and trial was begun on said date with the issue joined by the indictment on the one hand and the defendant's plea of not guilty on the other hand. The trial for said cause having continued from day to day until this the 7th day of March, 1974. The defendant and his counsel being present in open court during trial of said cause and all proceedings connected therewith at all times.

Now on this the 7th day of March, 1974 came said jury of good and lawful jurors to-wit: Barry D. Allan and eleven others, who having been duly empanelled and sworn according to law on and upon their oath do say:

> "We, the Jury, find the Defendant, Thomas D. McDonald, guilty as charged in Count One of the indictment.
>
> Barry D. Allan
> Foreman"

Thereupon the defendant being present in open Court and attended by his counsel was asked by the Court if he had anything to say why the sentence of the law and the judgment of the Court should not be pronounced upon him, and he said nothing.

Thereupon the Defendant being present in open Court and attended by his counsel and the Court having considered the same, it is ORDERED AND ADJUDGED by the Court that the Defendant is guilty, in accordance with the verdict of the jury, of accepting a bribe as charged in Count One of the indictment, and that as punishment for the said offense the defendant be and is sentenced to imprisonment in the penitentiary of Alabama for three (3) years.

The defendant and his counsel have been present in open Court at all times and at all stages of this trial and proceedings thereon.

Done this the 7th day of March, 1974.

/s/ L. S. MOORE
L. S. Moore
Special Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-514

THOMAS D. McDONALD,
PETITIONER

VERSUS

HONORABLE DAVID HEADRICK, AS SHERIFF OF MADISON COUNTY, ALABAMA, AND CHARLES F. EDGAR, JR., SURETY,
RESPONDENTS

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDICIES

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH M. SARTO
Attorney At Law

JOSEPH G. L. MARSTON, III
Special Assistant Attorney General of Alabama

COUNSEL FOR RESPONDENT

Address of Counsel:
MARSTON & SARTO
ATTORNEYS AT LAW
P.O. BOX 9065
150 WEST MAIN STREET
PRATTVILLE, ALABAMA
36067

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-514

THOMAS D. McDONALD,
PETITIONER

VERSUS

HONORABLE DAVID HEADRICK, AS SHERIFF OF MADISON COUNTY, ALABAMA, AND CHARLES F. EDGAR, JR., SURETY,
RESPONDENTS

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENTS

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the petitioner's conviction[1] is reported as follows:

[1] The Petition states, at page 2 under "Opinions Below", that the Petitioner was convicted of ". . . accepting a bribe' . . .". This is a mistatement. The issues in this case from indictment on have been: (1) Does the Alabama Statute outlaw offering to accept a bribe? (2) Did the indictment charge an offer to accept a bribe? (3) Was there sufficient evidence to prove that the Petitioner offered to accept a bribe?

The State Courts, in line with their earlier cases, ruled: (1) The statute outlaws both the taking of bribes and the offering to take bribes. (2) The indictment charged in the alternative both the taking of a bribe and an offer to take a bribe. (3) There was sufficient evidence to prove that the Petitioner offered to accept a bribe.

McDonald v. State 57 Ala. App. 529, 329 So 2d 583 (1975)

The order of the Supreme Court of Alabama quashing, as improvidently issued, the writ of certiorari issued to review the above opinion of the Court of Criminal Appeals of Alabama is reported as follows:

McDonald v. State 295 Ala 410, 329 So 2d 596 (1976)

The order of this Honorable Court denying a writ certiorari to review the conviction is reported as follows:

McDonald v. Alabama 429 U.S. 834, 50 L. Ed. 2d 99, 97 S. Ct. 99 (1976)

The order of the United States District Court for the Northern District of Alabama denying the Petitioner a writ of Habeas Corpus is not reported but is attached to the Petition. (Petition pages 5a-14a).

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of the writ is reported as follows:

McDonald v. Headrick, Sheriff, etc., et al, (5th Cir., 1977) 554 Fed. 2d 253.

JURISDICTION

The Petitioner seeks the writ under Title 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Does Federal Habeas Corpus lie to review a state interpretation of a State statute?

2. Does Federal Habeas Corpus lie to review the question of whether there is some evidence of an element of the *corpus delecti* of a State crime?

3. Was there some evidence of a bilateral agreement?

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent denys that this case involves any Constitutional provision, but the Petitioner is asserting a claim under the Fifth and Fourteenth Amendments to the Constitution of the United States. These provisions are set out at pages 2-3 of the Petition.

STATUTORY PROVISIONS INCLUDED

Title 28 United States Code, § 2254.State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

Title 14§§ 63 and 64, Code of Alabama, 1940 (recomp. 1958), the same being voluminous and are attached hereto as Appendix "A". However, for the convenience of this Honorable Court they are presented here in an abridged form with the language not relevant to this proceeding deleted:

Title 14§ 63: "BRIBERY OF . . . JUDICIAL OFFICERS ____ "Any person who corruptly of-

fers, promised or gives to any . . . judicial officer . . . any gift, gratuity, or thing of value, with the intent to influence his act, vote, opinion, decision or judgment, on any cause, matter, or proceeding, which may be pending, or may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two nor more than ten years."

Title 14 §64: "ACCEPTING BRIBE BY SUCH OFFICER ____ "Any . . . judicial officer . . . who corruptly accepts or agrees to accept any gift, gratuity or other thing of value, or promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with the understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question or proceeding, which is pending or may be by law brought before him in his official capacity . . . shall on conviction be imprisoned in the penitentiary for not less than two nor more than ten years."

STATEMENT OF THE CASE

The Petitioner was indicted for bribery by the Grand Jury of Madison County, Alabama, under Title 14, § 64, Code of Alabama, 1940 (recomp. 1958) Appendix "A". Said statute forbids, among other things, any judicial officer from accepting or agreeing to accept anything of value or promise of a thing of value under an agreement or with the understanding that his actions will be upon any side of any cause. The indictment tracked the statute and charged the Petitioner with accepting or agreeing to accept

the sexual favors or promise of sexual favors of Myra Braidfoot under an agreement or with the understanding that the Petitioner in his official capacity as County Judge would favorable dispose of a case then pending before him which involved Mrs. Braidfoot and her husband. (Appendix "B") (R. pp. 9 and T.R.[2] p. 2)

Issue was joined on the indictment. The cause was tried by a jury, which returned a verdict of guilty. The Petitioner was adjudged guilty in accordance with the verdict and sentenced to three years imprisonment. (T.R. pp. 1499)

Appeal was prosecuted to the Court of Criminal Appeals of Alabama. On this appeal the Petitioner argued: (1) The State Statute required proof of a "bilateral agreement" between the bribe giver and the bribe receiver, and (2) there was no proof of a "bilateral agreement" since the bribe receiver never intended to go through with the bribery scheme. The Court of Criminal Appeals of Alabama rejected this argument on its first premise holding that, (1) the Statute condemned unilateral offers to accept bribes and (2) the evidence of the Petitioner's offer to accept sexual favors for "taking care of Mrs. Braidfoot's case" was sufficient to support the conviction. *McDonald v. State* 57 Ala App 529, 329 So 2d 583 (1975). On petition of the Petitioner, the Alabama Supreme Court issued a Writ of Certiorari to review the affirmance by the Court of Criminal Appeals, however, on March 9, 1976, the Supreme Court quashed the writ as improvidently granted. *McDonald v. State* 295 Ala 410, 329 So 2d 596 (1976)

At this point, the Petitioner "Federalized" his claim by asserting, not withstanding the rejection of his argument

[2] "T.R." refers to the trial record, i.e., Respondents' Exhibits I-IX.

by the State Courts, that the statute required proof of a "bilateral agreement" and claiming, in this Honorable Court, that there was no proof of this "element of the corpus delecti." This Honorable Court declined to review the Petitioner's claim on October 4, 1976. *McDonald v. Alabama* 429 U.S. 834, 50 L. Ed. 2d 99, 97 S. Ct. 99 (1976) T.R. pp. 8-9)

Fifteen days later, on October 19, 1976, the Petitioner instituted the instant proceedings by filing a petition for a writ of habeas corpus in the U.S. District Court for the Northern District of Alabama. The claim was again that the statute allegedly required proof of a bilateral agreement and there was no evidence of such an agreement. On December 29, 1976, the District Court reluctantly denied the writ holding that it had no jurisdiction to revise the state interpretation of the State statute and that there was not a total lack of evidence to support the conviction.[3] (R. pp. 2-45, 148-154 and 177-178)

Appeal was taken to the United States Court of Appeals for the Fifth Circuit. That Court placed the case on the Summery Calendar, and, on June 20, 1977, affirmed the District Court writing as follows in pertinent part:

> "Alabama courts have interpreted the statute under which appellant was charged to proscribe even unilateral offers to accept bribes. In affirming ap-

[3] The District Court wrote in pertinent part: "The only constitutional issue before this Court is whether there was a total absence of evidence to support Petitioner's conviction. The Court has examined the pleadings, exhibits, and the excellent briefs submitted by the parties. In spite of a great feeling of compassion of the Petitioner, this Court cannot say that there was a total absence of evidence upon which the conviction was based."

pellant's conviction on direct appeal, the Alabama Court of Criminal Appeals held that:

> 'The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value," and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him.'
>
> "*McDonald v. State*, 329 So. 2d 583, 595 (Ala. Cr. App. 1975), writ of certiorari quashed as improvidently granted, 329 So. 2d 596 (Ala. 1975), cert. denied, 429 U.S. 834, 97 S. Ct. 99, 50 L. Ed. 2d 99 (1976). No Alabama court has construed Ala. Code tit. 14 § 64 to require proof of a bilateral agreement. We find no error in the district court's holding that there was not a total lack of relevant evidence to support the conviction. The judgment below is: "AFFIRMED."

From this holding, review is once again sought in this Honorable Court.

STATEMENT OF THE FACTS

On the trial of the case it was proven that in November and December, 1971, the Petitioner was Judge of the County Court of Madison County, Alabama. Among the cases then pending before the Petitioner at that time was the preliminary hearing of Mrs. Myra Layton Braidfood and her husband. Mrs. Braidfoot testified that during that period she was called to the Petitioner's chambers on three occasions. On each of these occasions, she testified, the conversations with the Petitioner did not concern her case,

the only business they had between them, but the Petitioner did comment on how attractive Mrs. Braidfoot was. On the third occasion, the following occurred:

"Q. What happened the third time, please ma'am?

"A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.

"THE COURT: Asked you what?

"A. If I could meet him at Kings Inn at 10:00.

"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.

"THE COURT: All right. I'm just a little hard of hearing.

"Q. Did he touch you or anything at that time, squeeze you?

"*A. He put his arm around my waist.*

"Q. This Defendant, Thomas McDonald?

"A. Yes, sir.

"*Q. And were you alone in his office?*

"*A. Yes, sir.*

"Q. And what again did he say now, other than meeting at the Kings Inn?

"*A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.*

"*Q. Of the case?*

"*A. Yes, sir.*

"Q. All right. If you met him at the Kings Inn at 10:00, what did you tell him?

"*A. I told him that I would.*

"Q. What, if anything did you do then?

"A. I left Huntsville and went to Decatur to my attorney Ralph Slate and told him of the situation." (T.R. pp. 186 and 187) (Emphasis supplied)

On hearing Mrs. Braidfoot's report, the attorney arranged to have the case transfered out of the Petitioner's court. The attorney accomplished this by waiving preliminary hearing before the petitioner. (T.R. pp. 181-189, 586-587 and 590-591)

Other witnesses were presented by the State to show that the incident with Mrs. Braidfoot was a part of a recurring pattern in which female defendants in the Petitioner's court were approached with nearly identical language, and subsequently met the Petitioner clandestinely and had sexual relations with him and, as a result, had their cases or cases in which they were interested disposed of in a most favorable manner. (T.R. pp. 241-259 and 423-439)

Other witnesses obtained favorable results after the Petitioner kissed and fondled them. To one witness the

Petitioner offered a motel room key with the suggestion that she meet him there. In return, the Petitioner indicated that he would not only help the witness with her long list of forgery charges but would be available to help the witness' friends with bail bond reduction, etc.[4] (T.R. pp. 442-444 and 447-455)

The Petitioner denied everything except meeting the witnesses in his chambers and discussing their cases. (T.R. pp. 901-1177)

SUMMARY OF THE ARGUMENT

The Petitioner was not convicted of accepting a bribe, as he claims throughout his petition, but of *offering* to accept a bribe.

The basic question in this case is: what do the words, ". . . agrees to accept . . . ." in the Alabama bribery statute mean? The Alabama Courts have held that they mean: ". . . offers to accept . . . .". This interpretation is consistent with the State Courts' prior decisions on bribery. *Staggs v. State* 53 Ala App 314, 229 So 2d 756 (1974) Federal habeas corpus is not available to review and revise State interpretations of State statutes. *Sorti v. Massachusetts*, 183 U.S. 138, 46 L. Ed 120, 22 S. Ct. 72 (1901) and others.

Since a determination of whether there is any evidence to support an element of the *corpus delecti* of a state crime

[4] The extent of the scheme was revealed indirectly by the fact that, although the Tourway Inn was mentioned by the Petitioner to only one of the state's witnesses, the Petitioner had a pass key to the rooms of that motel and an arrangement with the management whereby back rooms were made available to him on a regular basis without the Petitioner's registering (T.R. pp. 595-600)

would require a determination of whether or not a given matter is an element of the *corpus delecti* and would, therefore, require a review of the interpretation of state laws, Federal habeas corpus does not lie to review such a question. *Zavarro v. Commissioner* (S.D.N.Y., 1972) 345 F. Supp 809; *Edmondson v. Warden* (4th Cir, 1964) 335 F. 2d 608.

The "no evidence" cases cited by the Petitioner uniformly involved statutory *mala prohibita* offenses, while most involved political and social disent; these cases are distinguished from the instant case on these, if no other grounds. Clearly, the Petitioner was proven guilty of agreeing to accept a bribe.

The Petitioner was charged under a statute which condemns agreeing to accept a bribe, he was indicted for agreeing to accept a bribe, convicted of the same and his conviction was affirmed on the theory that he agreed to accept a bribe. The "bilateral agreement" theory was the Petitioner's theory of the case not the State's. *Cole v. Arkansas* (333 U.S. 196, 92 L. Ed 644, 68 S. Ct 514 (1948)) does not hold that an accused has the right to impose his own theory of the case on the prosecution.

The Petitioner cannot claim to have been convicted under an unforseen interpretation of the statute, since the Petitioner's conduct was clearly wrong, and the State Court's interpretation of the statute was natural interpretation of the statute's words and was foreshadowed by earlier cases. Compare *United States v. Wurzback* 280 U.S. 396, 74 L. Ed 508, 50 S. Ct. 167 (1930).

Finally, assuming for the sake of argument, that the Petitioner could not be convicted without some evidence of

a bilateral agreement, the witness' verbal acceptance of the Petitioner's proposal creates the mutual promises that constitute a bilateral agreement. (T.R. 187)

ARGUMENT

INTRODUCTION:

THE PETITIONER WAS NOT CONVICTED OF ACCEPTING A BRIBE

All through the petition, it is stated that the Petitioner was convicted of accepting a bribe. This is a gross misstatement. A glance at the indictment shows that the Petitioner was charged in several alternatives, one of which was that he, ". . . did . . . unlawfully and corruptly . . . agree to accept . . . [a bribe] . . . ." A glance at the record or the various judicial opinions issued by state and federal courts in this protracted litigation clearly shows that the Petitioner was convicted of agreeing or offering to accept a bribe.

I

THE FEDERAL WRIT OF HABEAS CORPUS DOES NOT LIE TO REVIEW STATE INTERPRETATIONS OF STATE STATUTES

A.

BRIBERY IN ALABAMA

The basic question presented by the Petition concerns three words in the Alabama Bribery Statute: ". . . agrees

to accept . . . ." What does ". . . agrees to accept . . . ." mean? The Petitioner insists that it means: "Enters a bilateral agreement to do something . . . ." The Respondent—State insists that it means: "Offers to accept. . . ."

In the Petitioner's view he could be convicted only if it were proven (1) that he offered to accept Mrs. Braidfoot's sexual favors in return for a favorable disposition of her case, (2) she accepted his offer, and (3) intended to go through with the proposal[5]. There are many difficulties with this view.

First, the Petitioner's view ignores the gravamen of the offense. The exchange of goods and services between individuals is no crime merely because one person happens to be a public official. Even in the instant case, had there been no offer to "take care" of Mrs. Braidfoot's case, in exchange for a proposed tryst, there would have been no crime. The gravamen of bribery is the corruption of public office. The effect of an offer to accept a bribe on an office or institution is about the same whether it is accepted or not.

Second, the Petitioner's approach would make his guilt depend on Mrs. Braidfoot's intentions. It is unknown to the criminal law to make accused's guilt depend on the intent of another.

Thirdly, the acceptance of Petitioner's theory would put the State of Alabama in the position of punishing citizens who merely offer to give bribes to public officials, while allowing the same public officials to offer to take bribes with impunity.

---

[5] This last is essential to the Petitioner's claim, since the evidence showed that Mrs. Braidfoot gave verbal assent to the proposal although she apparently did not intend to carry it out.

The early Alabama cases like those of other jurisdictions[6] held that offers to give bribes and, presumbly, mere offers to accept bribes[7], were not crimes. *Barefield* v. *State* 14 Ala 603 (1848). However, by the 1970's, the bribery statutes had been amended to include language referring to offers to accept bribes. Thus, in *Staggs* v. *State* (53 Ala. App 314, 229 So 2d 756[1974]) the Alabama Appellate Court was confronted with a fact situation very similar to the instant one except that the accused was a prospective bribe giver rather than a prospective bribe receiver. In *Staggs*, the Court held that an offer to give a bribe was condemned by the bribery statute. Thus, in holding in the Petitioner's case that a mere offer to accept a bribe constitutes bribery, the Alabama Appellate Courts were following their earlier decision in *Staggs*. Had the State Courts held otherwise, it would have approved for public officials that which it condemned for private citizens in Staggs. This would have made a mockery of the concept of equal justice.

B.

THE STATE INTERPRETATION OF THIS STATE STATUTE IS BINDING ON THE FEDERAL COURTS

The question, at this point is not whether the words,

[6] See **People v. Bowles** 70 Kan 824, 79 P. 726 (1905) and **People v. Weitzel** 255 P. 792, 52 A.L.R. 811 (1927) cited by the Petitioner. The Petitioner miscites **People v. Coffey** 161 Cal 433, 119 P. 901 (1911); **U.S. v. Dietrick** (D. Neb, 1904) 126 F. 664 and **Staggs v. State** 53 Ala App 314, 229 So 2d 756 (1974) for this same proposition. **Coffey** merely held that the offeror and offeree of a bribe were accomplices to each other, while **Dietrick** held the offer to accept and the offer to give a bribe were separate offenses. Compare **Fuller v. State** 40 Ala App 297, 115 So 2d 110 (1958); Cert Den 269 Ala 657, 115 So 2d 118; Cert Den 361 U.S. 936, 4 L. Ed 2d 368, 80 S. Ct 380.

[7] The instant case was the first Alabama case on this latter point.

". . . agrees to accept . . . ." mean a bilateral agreement, an offer to accept, or something else entirely; the State Courts have ruled that they mean "offer to accept". The question here is whether Federal habeas corpus is available to review this interpretation. By the very words of the Habeas Statute, Federal habeas corpus is available only to vindicate rights, privileges, and immunities under the Constitution, laws and treaties of the United States. 28 U.S.C. 2254(a). The Petitioner claims a denial of due process in that, he claims, he was convicted without any evidence of a "bilateral agreement", but this begs the question already settled adversely to the Petitioner by the State Courts. Before it reached the Petitioner's claim, a Federal Court would have to revise the State interpretation of the State Statute. This a Federal Court cannot do on Habeas Corpus. See, e.q.*Sorti* v. *Massachusetts* 183 U.S. 138, 46 L. Ed. 120, 22 S. Ct. 72 (1901), *Parker* v. *Estelle* (5th Cir, 1974) 498 F2d 625, Cert den 421 U.S. 963, 44 L. Ed. 2d 450, 95 S. Ct. 1951, and *McKinney* v. *Parsons* (5th Cir, 1975) 513 F2d 264, and many, many others.

II

FEDERAL HABEASCORPUS DOES NOT LIE DETERMINE WHETHER THERE IS ANY EVIDENCE TO SUPPORT AN ELEMENT OF THE *CORPUS DELECTI* OF A STATE CRIME

Claims of total lack of evidence of a single element of the *Corpus delecti* present serious problems. First, such a claim could be a camouflaged attack on the probative value of the evidence. In fact, the Petitioner makes such a claim here, when he suggests that he was denied due process in that he was convicted on the alleged uncorroborated evidence of a woman who had allegedly been convicted of a crime involving

moral turpitude. Questions of the probative value of the evidence are, in our system, for the jury and are not available on habeas corpus. See *Ballard v. Howard* (6th Cir, 1968) 403 F2d 653. Similarly, such claims could be attacks on the sufficiency of the evidence masquerading in the clothing of a Federal question. It is universally held that the sufficiency of the evidence in State cases is not available on Federal habeas corpus. See, for example, *Pleas* v. *Wainwright* (5th Cir, 1971) 441 F2d 56, and *Cunha* v. *Brewer* (8th Cir, 1975) 511 F 2d 894.

Most importantly, a determination of whether or not there is any evidence to support an element of the corpus delecti, would at the outset require a determination of whether or not the point in question is an element of the *corpus delecti*. This, in turn, would require a review of the State interpretation. As discussed in some detail above, a Federal Court cannot review a State interpretation of a State law. Therefore, it follows that the question of whether or not there is any evidence to support an element of the *corpus delecti* of a State crime is not available on Federal habeas corpus. See *Zavarro* v. *Commissioner* (S.D. N.Y., 1972) 345 F. Supp 809; *Edwardson* v. *Warden* (4th Cir, 1964) 335 F 2d 608.

III

THE PETITIONER'S ARGUEMENTS

A.

THE "NO EVIDENCE" CASES DISTINGUISHED

The Petitioner has cited numerous cases, none in point, for the proposition that where there is no evidence to support an essential element of the *corpus delecti* a conviction violates due process. Actually, these cases involve simple crimes whose *corpus delectii* had but one well defined element. Many of these cases involve political and social desent. *Gregory* v. *Chicago*, 394 U.S. 111, 22 L. Ed 2d 134, 89 S. Ct. 946 (1969); *Brown* v. *Louisiana*, 383 U.S. 131, 15 L. Ed 2d 637, 86 S. Ct. 719 (1966); *Shuttleworth* v. *Birmingham*, 382 U.S. 87, 15 L. Ed 2d 176, 86 S. Ct. 211 (1965); *Barr* v. *Columbia*, 378 U.S. 146, 12 L. Ed 2d 766, 84 S. Ct. 1734 (1964); *Taylor* v. *Louisiana*, 307 U.S. 154, 8 L. Ed 2d 395, 82 S. Ct. 1188 (1962); *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed 2d 207, 82 S. Ct. 248 (1961). All of these cases were prosecutions for *mala prohibita* offenses. *Shuttlesworth* v. *Birmingham*, supra (blocking a sideworld) *Vachon* v. *New Hampshire*, 414 U.S. 478, 38 L. Ed 2d 666, 94 S. Ct. 664 (1974) contributing to the delinquency of a minor), *Garner* v. *Louisiana*, supra, *Barr* v. *Columbia*, supra, *Brown* v. *Louisiana*, supra (disturbing the peace), *Gregory* v. *Chicago*, supra, *Thompson* v. *Louisiana*, 362 U.S. 199, 4 L. Ed 2d 654, 80 S. Ct. 624 (1960). (Disorderly conduct), *Johnson* v. *Florida*, 391 U.S. 596, 20 L. Ed 2d 838, 88 S. Ct. 1713 (1968) (vagrancy).

What conceivable relevance can such cases have here? Expression, in light of the First Amendment and our commitment to a republican form of Government, has a special place in our law. The criminality of Statutory *mala prohibita* offenses is controlled solely by the Statute.

In the instant case, the Petitioner stands convicted of bribery, a *malu in se* offense. He was convicted under a statute which condemns, *inter alia*, "agreeing to accept a bribe; the State Courts interprete "agreeing to accept a bribe" to mean "offering to accept a bribe". The Petitioner

was charged by indictment with agreeing to accept a bribe. The evidence showed that he placed his arm around Mrs. Braidfoot and invited her to meet thim at a motel to discuss her case and maybe "take care" of it. The evidence also showed that the Petitioner approached other women with similar language, and later met them, had sexual relations with them and favorably disposed of their cases. Clearly, the Petitioner was proven guilty of the conduct condemned by the Statute.

B.

THE PETITIONER WAS CONVICTED OF THE CHARGED CONDUCT

The Petitioner claims that he was convicted of a crime for which he was not charged. This is not so. The indictment charged that the Petitioner agreed to accept a bribe; he was convicted of agreeing to accept a bribe and the conviction was affirmed on the theory that he agreed to accept a bribe.

The Petitioner relies here on *Rabe* v. *Washington*, 405 U.S. 313, 31 L. Ed 2d 258, 92 S. Ct. 993 (1972); *Eaton* v. *Tulsa* 415 U.S. 697, 39 L. Ed 2d 693, 94 S. Ct. 1077 (1974) and *Cole* v. *Arkansas*, 333 U.S. 196, 92 L. Ed, 644 68 S. Ct. 514 (1948). Of these, *Rabe* and *Eaton* clearly have no application[8].

On the other hand, what does *Cole* have to do with this case? The indictment is clearly drawn under Section 64. The proceedings at trial and appeal were based on Section 64. The prosecution's theory from indictment on was, is

[8] In addition to the other obvious differences, these cases both involved expression.

and will continue to be, that the convict offered to accept sexual favors from Mrs. Braidfoot in return for a favorable disposition of her case. To be sure, the convict has argued his bilateral agreement theory *ad nauseum* at each phase of these protracted proceedings, but each time he raised it he was met with vigorous adverse argument by the state and rejection by the State courts. On what conceivable basis can the convict describe the bilateral agreement theory as "the State's theory of the case"? This is *his* theory of the case. *Cole* certainly does not stand for the proposition that an accused has the right to be tried on his own theory of the case. *Cole* does not apply in any way to this case.

C.

THE PETITIONER'S CLAIM OF BEING CONVICTED UNDER AN UNFORESEEN INTERPRETATION OF A STATUTE IS FRIVOLOUS

The Petitioner claims that he was convicted under an unforseen interpretation of a state statute. This is absurd. Can the Petitioner, who at the time of these events was a lawyer and a judge, claim that he thought it was alright to offer to exchange judicial leniency for sex? Surely not!

Can it be said that the State Courts' interpretation of "agrees to accept" as "offers to accept" is outlandish? Again, surely not. This is a natural interpretation of these words and was foreshadowed by the State Courts' earlier interpretations of the State's bribery laws.[9]

An argument similar to the Petitioner's on this point was

[9] The Fifth Circuit noted: "No Alabama Court has construed Ala. Code Title 14 § 64 to require proof of a bilateral agreement."

made in *United States* v. *Wurzback* (280 U.S. 396, 74 L. Ed 508, 50 S. Ct. 167 (1930)). In that case, the argument was rejected with Justice Oliver W. Holmes writing:

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." 280 U.S. 396, 399, 74 L. Ed. 508, 510

This language was more recently quoted with approval in *Hamling* v. *United States* (418 U.S. 87, 124, 41 L. Ed 2d 590, 624, 94 S. Ct. 2887 (1974)).

Clearly, the Petitioner knew or should have known that he was, to say the least, close to the line drawn by the bribery statutes when he offered to exchange judicial leniency for sex. Clearly, he took the risk in making his infamous offer.

D.

THE PETITIONER'S CONVICTION OUGHT NOT BE SET ASIDE ON THE GROUNDS THAT HE RIAL COURT GAVE THE JURY CHARGES REQUESTED BY HIM

Convicted persons often seek new trials on the grounds that their requested charges to the Jury were denied, but this Petitioner seeks a new trial on the grounds that several of his requested charges were given. The charges in question are long, wordy and confusing. It is most difficult to ascertain their meaning and impossible to measure their accuracy as statements of law.

Trial Judges often give questionable charges requested by accused persons out of a commendable concern for the rights of accused persons and to protect the record on appeal in the event of a conviction. In any event, it is most difficult to see how the Petitioner can demand a new trial on the grounds that his requested charges were given.

IV.

THERE WAS SOME EVIDENCE OF A BILATERAL AGREEMENT BETWEEN THE CONVICT AND MRS. BRAIDFOOT

Finally, let us assume for the moment and purely for the sake of argument that the charge against the convict involved a bilateral agreement. A bilateral agreement is an agreement where there are reciprocal promises. The evidence in this case showed that the convict made an offer to Mrs. Braidfoot, if she would meet him at a motel, etc., and she gave at least verbal assent to his offer.[10] There were, then, reciprocal promises, a bilateral agreement.

The fact that Mrs. Braidfoot did not keep or even intend to keep her part of this unlawful bargain is, of course, utterly irrelevant.

---

[10] Mrs. Braidfoot testified:

"Q. All right. If you met him at the Kings Inn at 10:00, what did you tell him?

"A. I told him that I would". (T.R. 187)

CONCLUSION

In conclusion the Respondents and the State of Alabama respectfully submit that the order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit are patently correct, and pray that the writ be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
ATTORNEY GENERAL OF ALABAMA

JOSEPH M. SARTO
ATTORNEY AT LAW

JOSEPH G. L. MARSTON, III
SPECIAL ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

MARSTON & SARTO
ATTORNEYS AT LAW
P.O. BOX 9065
150 WEST MAIN STREET
PRATTVILLE, ALABAMA 36067

APPENDICES

APPENDIX "A"

CODE OF ALABAMA, TITLE 14

§ 63. (3456) (6400) (4409) (3913) (4116) (3560) (20) Bribery of executive, legislative, or judicial officers.—Any person who corruptly offers, promises, or gives to any executive, legislative or judicial officer, or municipal officer or to any deputy clerk, agent or servant of such executive, legislative, judicial or municipal officer after his election, appointment, employment, either before or after he has been qualified, any gift, gratuity, or thing of value, with intent to influence his act, vote, opinion, decision or judgment, on any cause, matter, or proceeding, which may be then pending, or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than ten years. (1935, p. 178; 1943, p. 583, appvd. July 20, 1943.)

§ 64. (3457) (6401) (4410) (3914) (4117) (3561) (21) Accepting bribe by such officer.—Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or the clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years. (1935, p. 178; 1943, p. 584, appvd. July 10, 1943.)

APPENDIX "B"

INDICTMENT

STATE OF ALABAMA
CIRCUIT COURT, FEBRUARY TERM, 1973
MADISON COUNTY

The Grand Jury of said County charge, that before the finding of this indictment,

COUNT ONE

Thomas D. McDonald, alisa Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecu-

tion being other identified as the *State of Alabama vs. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants,* Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or caused to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alisa Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Special Assistant Attorney General of Alabama, one of the attorneys for David Headrick, Sheriff, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 26TH. day of OCT. 1977, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendices on the Attorney for the Petitioner, by mailing the same to him, first class postage prepaid, and addressed to him as follows:

Mr. Glenn F. Manning, Esq.
Watts, Solmon, Roberts, Manning & Noojin,
Attorney at Law
Suite 200
Terry-Hutchens Building
P.O. Box 287
Huntsville, Alabama 35804

JOSEPH G. L. MARSTON, III
Special Assistant Attorney General
State of Alabama

ADDRESS OF COUNSEL:

MARSTON & SARTO
Attorneys at Law
P.O. Box 9065
150 West Main Street
Prattville, Alabama 36067